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Circuit Court of Appeals

For the Ninth Circuit.

No. 4125.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff in Error,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Defendant in Error.

No. 4126.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff in Error,

vs.

GLOBE INDEMNITY COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writs of Error to the Southern Division of the United
States District Court of the Northern District of
California, Second Division.

FILED

NOV 13 1923

F. D. MONKTON,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

No. 4125.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

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FIDELITY AND DEPOSIT COMPANY OF
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United States
Circuit Court of Appeals
For the Ninth Circuit.

AVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff in Error,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

Names and Addresses of Attorneys of Record.

Messrs. PILLSBURY, MADISON & SUTRO,
Standard Oil Bldg., San Francisco, Calif.,
Attorneys for Plaintiff in Error.

Messrs. REDMAN & ALEXANDER, Aetna Bldg.,
San Francisco, Calif.,
Attorneys for Defendant in Error.

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Defendant.

Amended Complaint upon Attachment Bond.

Plaintiff, by leave of Court, files this its amended complaint against defendant and for a first cause of action alleges:

I.

That at all times herein mentioned plaintiff was and is now a corporation organized and existing under the laws of the State of New York, and is a citizen and resident of said State of New York.

II.

That at all times herein mentioned defendant was and is now a corporation organized and existing under the laws of the State of Maryland, and is a citizen and resident of said State of Maryland.

III.

That the matter in controversy in this action exceeds, exclusive of interest and costs, the sum of \$3,000; that the value of the subject matter of this action exceeds, exclusive of interest and costs, the sum of \$3,000.

IV.

That heretofore, to wit, on or about the 28th day of August, 1920, one Warren R. Porter, commenced an action in the above-entitled court against the plaintiff herein, to recover damages from plaintiff for alleged breaches by plaintiff of certain written contracts between plaintiff and said Warren R. Porter; that said action was numbered in said court No. 16,430; that thereafter, in said action, and on or about the 6th day of December, 1920, said Warren R. Porter procured a writ of attachment to issue out of and over the seal of said court against the property of plaintiff. [1*]

V.

That on or about said 6th day of December, 1920, and in consideration of the issuance of said writ of attachment, defendant executed a certain written bond and undertaking, a copy of which is hereto attached and marked Exhibit "A" and is hereby

*Page-number appearing at foot of page of original certified Transcript of Record.

referred to and made a part hereof the same as if herein set forth at length.

VI.

That on or about the 21st day of November, 1921, there were pending in said court, in addition to said action No. 16,430, three certain other actions between said Warren R. Porter and this plaintiff, which said actions were numbered in said court, respectively, No. 16,452, No. 16,498 and No. 16,518; that all of said actions arose out of the same transactions as said action No. 16,430, and involved issues substantially similar to the issues in said action No. 16,430.

VII.

That on or about said 21st day of November, 1921, by an order of said court on said day duly given or made and entered, said actions No. 16,430, No. 16,452, No. 16,498 and No. 16,518 were consolidated for all purposes; that thereafter, pursuant to said order of said court, all of said actions were collectively entitled in said court "Warren R. Porter, doing business under the name and style of Porter Trading Company, Plaintiff, vs. Java Coconut Oil Co., Ltd., a Corporation, Defendant," and were numbered therein as No. 16,430.

VIII.

That thereafter and on or about the 8th day of December, 1921, judgment was duly given or made and entered in said consolidated action No. 16,430; that said judgment was that said Warren R. Porter take nothing by said consolidated action No. 16,430, and that this plaintiff have and recover from said

Warren R. Porter the sum of \$494,498.30 damages and its costs of suit; that thereafter, and on or about the 23d day of December, 1921, said costs in said consolidated action No. 16,430 were duly taxed in favor of this plaintiff and against said Warren R. Porter in the sum of \$2,569.45. [2]

IX.

That of said sum of \$2569.45, the sum of \$1591.64 was awarded to and in favor of this plaintiff, and against said Warren R. Porter, on account of said original action No. 16,430, in which defendant executed said written bond and undertaking Exhibit "A"; that said sum of \$1591.64 was awarded to this plaintiff as its costs in said original action No. 16,430; that said sum of \$1591.64 includes no items of costs in said action No. 16,452, or in said action No. 16,498, or in said action No. 16,518, or in any other action except said original action No. 16,430, wherein defendant executed said written bond and undertaking Exhibit "A."

X.

That writs of execution against the property of said Warren R. Porter have issued out of and over the seal of said court in said consolidated action No. 16,430, and returned unsatisfied; that there is now due, owing and unpaid on said judgment from said Warren R. Porter to plaintiff herein the sum of \$441,557.40 or thereabouts, together with interest thereon at the rate of seven per cent per annum from the 10th day of March, 1922. That, although thereunto requested, defendant has not paid said sum of \$1591.64, or any part thereof, to plaintiff,

and the whole of said sum of \$1591.64 is now due, owing and unpaid from defendant to plaintiff herein.

XI.

That all and singular the matters and things alleged in this cause of action are ancillary to said original action No. 16,430 and within the jurisdiction of this Honorable Court.

And for a second cause of action plaintiff alleges:

I.

Plaintiff hereby refers to and repeats and makes a part hereof, to all intents and purposes the same as if herein set forth at length, the allegations of paragraphs, I, II, III, IV, V, VI, VII, VIII and X of the first cause of action herein.

II.

That to procure the dissolution of said attachment, it [3] was necessary for plaintiff to defend said original action No. 16,430 and said consolidated action No. 16,430; that plaintiff employed for such purpose the law firm of Pillsbury, Madison & Sutro; that said firm represented plaintiff in said original action No. 16,430, and said consolidated action No. 16,430, and defended the same for plaintiff.

III.

That for the services of said firm in said original action No. 16,430 and said consolidated action No. 16,430, plaintiff has paid to said firm sums in excess of \$25,000, of which the sum of \$15,000 was paid for services of said firm rendered to plaintiff subsequent to the issuance of said attachment and to secure the dissolution thereof; that is to say, that

plaintiff has paid said sum of \$15,000 to said firm for services rendered by said firm subsequent to the 6th day of December, 1920, in defending said original action No. 16,430 and said consolidated action No. 16,430, in so far as the same related to the said original action No. 16,430; that no part of said sum of \$15,000 was paid to said firm for services in or in connection with said actions No. 16,452, No. 16,498 and No. 16,518, or any thereof, or for services in said consolidated action No. 16,430 relating to said three last-mentioned actions, or any thereof; that said sum of \$15,000 was the reasonable value of the services of said firm in securing the dissolution of said attachment, and was a reasonable sum for plaintiff to have paid to said firm for that purpose.

IV.

That plaintiff has sustained damages by reason of said attachment in the sum of \$15,000 which it has paid to said firm, as hereinbefore alleged; that although thereunto requested, defendant has not paid said sum of \$15,000, or any part thereof, to plaintiff, and that the whole of said sum is now due, owing and unpaid from defendant to plaintiff herein.

V.

That all and singular the matters and things alleged in this cause of action are ancillary to said original action [4] No. 16,430, and within the jurisdiction of this Honorable Court.

WHEREFORE, plaintiff prays judgment against defendant for the sum of \$16,591.64, together with

interest on the sum of \$1591.64 at the rate of seven per cent per annum from the 8th day of December, 1921, and for its costs of suit.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Alfred Sutro, being first duly sworn, deposes and says: That he is a member of the firm of Pillsbury, Madison & Sutro, attorneys for the plaintiff, Java Coconut Oil Company, Ltd., a corporation, named in the foregoing amended complaint; that the reason this affidavit is not made by an officer of said plaintiff, but is made by affiant, is that there is no officer of the plaintiff in the city and county of San Francisco, State of California, where affiant resides and has his office; that affiant has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

ALFRED SUTRO.

Subscribed and sworn to before me this 14th day of June, 1922.

[Seal]

FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California. [5]

Exhibit "A."

(Title of Court and Cause.)

UNDERTAKING AND ATTACHMENT.

WHEREAS, the above-named plaintiff has commenced, or is about to commence, an action in the Southern Division of the U. S., for the Northern District of California, Second Division, against the above-named defendants upon express contract for the direct payment of money, claiming that there is due to said plaintiff from the said defendants the sum of Seventy-Two Thousand One Hundred Sixty-Six and 25/100 Dollars, besides interest, and is about to apply for an attachment against the property of said defendants as security for the satisfaction of any judgment that may be recovered therein;

NOW, THEREFORE, the undersigned, Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, in consideration of the premises, and of the issuing of said attachment, does undertake in the sum of Thirty-Six Thousand Eighty-Three and 15/100 (36,083.15) Dollars, lawful money of the United States of America, and promise to the effect, that if the said Defendants or either of them, recover judgment in said action, the said Plaintiff will pay all costs that may be awarded to the said Defend-

ants or either of them and all damages which they or either of them may sustain by reason of the said attachment, not exceeding the said sum of Thirty-Six Thousand Eighty-Three and 15/100 (36,083.15) Dollars; and that if the said attachment is discharged on the ground that Plaintiff was not entitled thereto under section five hundred and thirty-seven, Code of Civil Procedure, the Plaintiff will pay all damages which the defendant may have sustained by reason of the attachment, not exceeding the said sum specified in the undertaking.

IN WITNESS WHEREOF, The Fidelity and Deposit Company of Maryland, has caused its name to be hereunto subscribed by its Attorney in Fact, and attested by its agent thereunto duly [6] authorized, and its seal to be hereunto affixed, this 6th day of December, A. D. 1920.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND,

By JOHN H. ROBERTSON,
Its Attorney in Fact.

[Seal] Attest: S. M. PALMER,
Agent.

[Endorsed]: Filed Dec. 7, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of copy of the within amended complaint
is hereby admitted this 14th day of June, 1922.

REDMAN & ALEXANDER,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 15, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk.
[7]

(Title of Court and Cause.)

Demurrer to Amended Complaint.

Now comes the defendant in the above-entitled action and demurring to the amended complaint of the plaintiff herein, as grounds of demurrer specifies:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action.

II.

That said amended complaint is uncertain, ambiguous and unintelligible in the particulars hereinafter specified.

III.

That the first count or alleged cause of action set up in said amended complaint does not state facts sufficient to constitute a cause of action.

IV.

That the second count or alleged cause of action set up in said amended complaint does not state facts sufficient to constitute a cause of action.

V.

That said second count is uncertain in the following particulars:

1. That it cannot be ascertained therefrom what services were rendered by the law firm of Pillsbury, Madison & Sutro in defending said action No. 16,430 that would not have been rendered had no attachment been issued in said action.

2. That it cannot be ascertained therefrom what services were rendered by said attorneys to secure a dissolution of said attachment other than services rendered in defending said action.

3. That it cannot be ascertained therefrom whether or not the sum of fifteen thousand dollars (\$15,000.00) alleged to have been paid to said attorneys for services rendered by them subsequent to the issuance of said attachment embraced services rendered subsequent to said time in the prosecution of plaintiff's cross-complaint in said action No. 16,430 wherein [8] plaintiff recovered a judgment against said Warren R. Porter in the sum of four hundred ninety-four thousand, four hundred ninety-eight dollars and thirty cents (\$494,498.30).

4. That it cannot be ascertained therefrom how, or why, or if, it became necessary in order to secure a dissolution of said attachment to prosecute a cross-complaint against said Warren R. Porter to recover said sum of four hundred ninety-four thousand, four hundred ninety-eight dollars and thirty cents (\$494,498.30).

5. That it cannot be ascertained therefrom how defendant can be liable for costs incurred by plaintiff in the prosecution of its said cross-complaint against said Porter.

6. That it cannot be ascertained therefrom what costs were incurred by plaintiff in defending said action No. 16,430 and what costs were incurred by it in the prosecution of its said cross-complaint against said Porter.

7. That said second count is ambiguous in the same respects in which it is herein alleged to be uncertain.

8. That said second count is unintelligible in the same respects in which it is herein alleged to be uncertain.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant have judgment for its costs.

REDMAN & ALEXANDER,
Attorneys for Defendant.

Receipt of a copy of the within demurrer to amended complaint admitted this 14th day of July, 1922.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 15, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

At a stated term, to wit, the July term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 18th day of September, in the year of our Lord one thousand nine hundred twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

**Minutes of Court—September 18, 1922—Order
Overruling Demurrer to Amended Complaint.**

Defendant's demurrer to the amended complaint heretofore submitted to the Court, Judge Dietrich presiding, being fully considered it is ordered that the memorandum opinion of Judge Dietrich be filed and that in accordance with said opinion, the demurrer to amended complaint be and is hereby overruled. [10]

(Title of Court and Cause.)

**Memorandum Decision upon Demurrer to Amended
Complaint.**

PILLSBURY, MADISON & SUTRO, Attorneys
for Plaintiff.

REDMAN & ALEXANDER, Attorneys for De-
fendant.

DIETRICH, District Judge.—The question is raised whether objection for uncertainty in a complaint can be presented by demurrer. When the original pleading was under consideration I assumed as a matter of course that demurrer was the proper procedure, such having, as I understood, always been the practice, both in California and in Idaho, where the California code provisions prevail. After the original decision was filed my attention was called to the Lucid case (199 Fed. 377). I have not before me the record in this case, and am

not disposed now to give the question extended consideration, for it would seem to me quite unimportant, in view of the general rule that courts disregard the names of things and look to the substance. What does it matter whether we call the paper here a motion or a demurrer? It clearly states defendant's objections for uncertainty, and these I am disposed to consider upon the merits.

The amended complaint is thought to be reasonably clear, and in each cause of action the facts pleaded are sufficient to entitle the plaintiff to relief. By so holding I am not to be understood as foreclosing certain questions discussed by the defendant partly upon the assumption of facts appearing only by remote inference or in the records of the attachment cases. Those questions, it is thought, can be more safely answered when the evidence is in. The plaintiff has not seen fit to exhibit in full the records in the attachment cases, but has pleaded sparingly and cautiously, as is its right. Some of the essential averments may be difficult of proof, but at this juncture we are not at liberty to consider whether plaintiff will be able satisfactorily to establish the truth of its averments. It has [11] specifically alleged that, to procure the dissolution of the attachment upon which the bond in question was given, it was necessary for it to defend the action upon the merits, that plaintiff employed for such purpose a law firm, and that this firm represented it in such defense, which, as already suggested, it claims it was necessary to make for the purpose of ridding itself of the attachment. It is further clearly claimed that the

services for which the plaintiff now seeks reimbursement were rendered in the action in which the bond was given, and not in any other action, and were rendered subsequent to the issuance of the attachment and to secure its dissolution, and that the sum paid for the services was without any reference to services rendered in others of the consolidated suits.

Defendant now argues that under all the circumstances it must be apparent that the services were rendered primarily in defense of the suit, and that the dissolution of the attachment was a mere incident. That may turn out to be true, but such a theory is not in harmony with the allegations of the pleading.

The demurrer will be overruled.

[Endorsed]: Filed Sept. 18, 1922. Walter B. Maling, Clerk. [12]

(Title of Court and Cause.)

Answer to Amended Complaint.

Now comes the defendant in the above-entitled action and answering unto the amended complaint therein denies and alleges as follows:

I.

Answering unto the first count set up in said complaint defendant,

1. Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegation contained in the first subdivision or paragraph of said count, and therefore and upon that ground denies the same and the whole thereof.

2. Denies that the value of the subject matter of this action exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000.00), or any other sum.

3. Defendant has no information or belief upon the subject sufficient to enable it to answer the allegation that all of the actions referred to in said count arose out of the same transactions as the action numbered 16430, and involved issues substantially similar to the issues in said action numbered 16430, and therefore and upon that ground denies the same and the whole thereof.

4. Denies that all and singular or all or singular the matters and things, or any thereof, alleged in said count are or is ancillary to said original action numbered 16430.

5. Admits that costs were taxed in favor of the defendant in the action referred to in said count numbered 16430 in the sum of one thousand five hundred ninety-one dollars and sixty-four cents (\$1,591.64), but alleges that said costs were incurred in part in the prosecution of a cross-complaint filed in said action by the defendant therein, the plaintiff herein, upon which cross-complaint defendant recovered judgment against plaintiff in said action in the sum of four hundred ninety-four [13] thousand, four hundred ninety-eight dollars and thirty cents (\$494,498.30).

6. Denies that the sum of one thousand five hundred ninety-one dollars and sixty-four cents (\$1,591.64), or any other sum, is now due, owing and un-

paid, or was at any time due or owing or unpaid from defendant to plaintiff.

II.

Answering unto the second count set up in said complaint, defendant,

1. Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegation contained in the first subdivision or paragraph of said count, and therefore and upon that ground denies the same and the whole thereof.

2. Denies that the value of the subject matter of this action exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000.00), or any other sum.

3. Denies that the sum of one thousand five hundred ninety-one dollars and sixty-four cents (1,591.64), or any other sum, is now due, owing and unpaid, or was at any time due or owing or unpaid from defendant to plaintiff.

4. Denies that to procure the dissolution of the attachment referred to in said count it was necessary for the plaintiff herein, the defendant in said action No. 16430, to defend said action.

5. Defendant has no information or belief upon the subject sufficient to enable it to answer the allegation that the plaintiff herein paid to the law firm of Pillsbury, Madison & Sutro sums in excess of the sum of twenty-five thousand dollars (\$25,000.00) for services rendered by said firm in said original action No. 16430, and said consolidated action No. 16430, and therefore and upon that ground denies that the plaintiff herein paid for said or any services

rendered by said firm or any one in both or either of said actions sums in excess of twenty-five thousand dollars (\$25,000.00) or any other sum. Defendant denies upon information and belief that the sum of fifteen [14] thousand dollars (\$15,000.00) was paid for services of said firm rendered to plaintiff subsequent to the issuance of said attachment, and denies that said sum was paid by plaintiff to said firm to secure the dissolution of said attachment; and denies that said sum of fifteen thousand dollars (\$15,000.00), or any other sum, was or is the reasonable or any value of the services of the said firm in securing the dissolution of said attachment; and denies that any services were rendered by said firm in securing the dissolution of said attachment; and denies that said or any sum was a reasonable sum for plaintiff to have paid said firm for that purpose.

6. Denies that plaintiff has sustained damages or any damage by reason of said attachment in the sum of fifteen thousand dollars (\$15,000.00), or any other sum; and denies that the whole of said sum or any other sum is now due, owing and unpaid, or at any time was or is due or owing or unpaid from the defendant to plaintiff.

7. Defendant has no information or belief upon the subject sufficient to enable it to answer the allegation that all of the actions referred to in said count arose out of the same transactions as the action numbered 16430, and involved issues substantially similar to the issues in said action numbered

16430, and therefore and upon that ground denies the same and the whole thereof.

8. Denies that all and singular, or all or singular the matters and things, or any thereof, alleged in said count are or is ancillary to said original action numbered 16430.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant have judgment for its costs.

REDMAN & ALEXANDER,
Attorneys for Defendant. [15]

United States of America,
State of California,
City and County of San Francisco,—ss.

Guy LeRoy Stevick, being first duly sworn, deposes and says: That he is an officer of the defendant in the above-entitled action, namely one of the vice-presidents thereof. That he has read said answer and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated upon information or belief and that as to such matters he believes it to be true.

GUY LEROY STEVICK.

Subscribed and sworn to before me this 9th day of October, 1922.

[Seal] OLIVER DIBBLE,
Notary Public in and for the City and County of
San Francisco, State of California.

Service of the within answer admitted this 9th day of October, 1922.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 9, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

(Title of Court and Cause.)

Stipulation Waiving Jury.

It is hereby stipulated by and between the respective parties to the above-entitled action that a jury in said action be, and the same is hereby, waived.

Dated: San Francisco, April 17, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

REDMAN & ALEXANDER,

Attorneys for Defendant.

Approved:

BOURQUIN,

Judge.

[Endorsed]: Filed Apr. 19, 1923. Walter B.
Maling, Clerk. [17]

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial on the 25th day of April 1923, being a day in the March, 1923 term, of said Court, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed herein; Alfred Sutro, Esq., appearing as attorney for plaintiff and L. A. Redman, Esq., appearing as attorney for defendant; and the trial having been proceeded with and oral

and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys, having been submitted to the Court for consideration and decision; and the Court after due deliberation, having filed its opinion and ordered that judgment be entered in favor of plaintiff and against defendant in the sum of \$1591.64, together with interest at 7% per annum from December 8, 1921, and for costs:

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Java Cocoanut Oil Company, Ltd., a corporation, plaintiff, do have and recover of and from Fidelity and Deposit Company of Maryland, a corporation, defendant, the sum of Seventeen hundred forty-six and 38/100 (\$1746.38) Dollars, together with its costs herein expended taxed at \$25.80.

Judgment entered April 28, 1923.

WALTER B. MALING,
Clerk. [18]

United States District Court, California.

No. 16715.

JAVA ETC. CO.

vs.

FIDELITY ETC. CO.

No. 16716.

JAVA ETC. CO.

vs.

GLOBE ETC. Co.

(Decision, Etc.)

These actions tried together are against sureties in undertakings on attachments against plaintiff. It appears that one Porter brought actions against plaintiff, it counter-claimed and cross-complained, itself brought actions against Porter, was attached and itself attached, and defendants separately were Porter's sureties in his attachment undertaking; that a few days after levy in said actions, plaintiff gave to the marshal the statutory security for and secured discharge of the lien and release of the property; that in due time all the actions were consolidated and tried, resulting in judgment for plaintiff and against Porter in amount about \$500,000; that of the costs recovered, \$1591.64 are due to the action of the undertaking of the action first in the title named, and \$869.19 are due to the like of the action, second so named; that of \$50,000 attorneys' fees paid by plaintiff in respect to the actions, no allocation was made between services due to the attachments and services due to the actions otherwise; that of said fees, \$15,000 "is the reasonable value of the services rendered subsequent" to the levy of the attachment, "in defending" the action of the undertaking first aforesaid, original and consolidated, and \$10,000 are the like in respect to the action of the undertaking second aforesaid.

Plaintiff seeks recovery of said costs and fees upon the theory that the attachments endured until trial and determination of the actions upon the merits, that the latter was [19] necessary to dis-

pose of the former, and that the whole of said disbursements are "costs awarded" and damages sustained "by reason of the attachment." In support it cites amongst others,

Gregory vs. Co. (Kan.), 185 Pac. 35;

Mosely vs. Co. (Idaho), 189 Pac. 862;

Crom vs. Henderson (Iowa), 175 N. W. 983;

Anvil Gold Co. Case, 125 Fed. 725.

Defendant, *contra*, so far as said fees are concerned, cites St. Josephs etc. Co. vs. Love (Utah), 195 Pac. 308 and other cases in it referred to. These cases and their citations disclose the conflict in respect to the extent that attorneys' fees are damages in attachments, and that, tho involving statutes of little or no material difference without review of them and their distinctions and differences, it suffices to say that it is believed the theory of defendants, viz., that reasonable attorneys' fees paid in respect to the attachments alone and not those paid in respect to the merits of the action, are damages "by reason of" the attachments and for which sureties are liable, is the better rule, sound in principle, sustained by superior authority, and further locally justified by analogy.

Attachments are incidents of an action, and are provisional remedies to secure the fruits of success in trial and determination of the action on the merits. Attorneys' services may or may nor be required in respect to the attachments, but are required in respect to the action. Any services rendered to dispose of the attachments, are "by reason of" the attachments, but any rendered to dispose of the ac-

tion and its merits are not "by reason of" the attachments. They are "by reason of" the action, quite a different thing in fact, statutes and undertaking. That by success upon trial of the action and its merits the attachments are dissolved, is an incidental consequence of services rendered in respect to the former and not to the latter. The rule is like that in respect to other provisional remedies, injunctions, replevin, receiverships. Altho no local court seems to have determined a like issue in an attachment action, the case of *Alaska Co. vs. Hirsch* (Cal.), 47 Pac. 127, is analogous in its rule that attorneys' [20] fees for dissolution of an injunction are damages "by reason of" it and recoverable from sureties, but not those for trial of the action and its merits, even tho in the latter the enjoined party succeeding, necessarily dissolves the injunction. Clearly, had the party enjoined secured its dissolution on bond, as the plaintiff in the instant case did the attachments, his claims of right to assign attorneys' fees for trial of the action and its merits as damages "by reason of" the injunction, and to recover them from the sureties, would not have been bettered. So, here. Bonds given by plaintiff (perhaps in duty to minimize damages and the expense of which is awarded it), the levies and the liens and so the "attachments" were released altho the writ was not vacated but endured until it necessarily fell by reason of judgment on the merits for plaintiff. The mere existence of a writ, however, gives no cause of action for damages in so far as attorneys' fees are concerned at least. See Long

vs. Bank (Idaho), 165 Pac. 1119. Attachment liens released "the attachments had spent their force and the surety companies became responsible for all damages attributable directly to the attachments." However, subsequent and indirect damages, due to "bringing of the actions may also have damaged or added to the damages, * * * but such result was not due to the attachment"; and the attaching party "and not the surety company was the party responsible therefor."

Fidelity Co. vs. Co., 189 U. S. 143, a case fairly analogous in facts and principle.

So too is the Anvil Gold Co. case, 125 Fed. 725. There as here, the "attachment" was dissolved on security bond, tho there, by order of court; here, by order of statute. Attorneys' fees as costs or damages are not favored and are recoverable only when with clear support in contract or statute. Plaintiff not having segregated fees for services due to the attachments from those due to the trial of the action, cannot recover for them. It may be on sufficient data an allowance might be made by the Court, but apparently plaintiff seeks all [21] or none.

So far as costs are concerned, defendants concede them and moved for judgment for plaintiff to that extent.

In argument, however, counsel suggests plaintiff ought not recover \$500 it paid for an attachment undertaking in one of the actions and prior to Porter's attachment and the Fidelity Co.'s undertaking in the same action.

The sum is within the statutes and defendants'

undertaking—"costs awarded," and hence, recoverable.

Unlike damages, costs are not by the statute limited to those "by reason of" the attachment, but include all by reason of or in the action. It is significant that the statute makes this distinction, and impels construction accordingly. Even as plaintiff above, defendant is disposed to ignore small things, advising the court that if it does erroneously allow the item to plaintiff, no review will be sought, for—*De minimis non curat lex*.

A magnificent gesture to say the least, and a little more this exuberant generosity and lordly spirit, plaintiff's demands might have been paid in full without litigation. Plaintiff is entitled to recover the costs aforesaid, of and from defendants as follows:

From Fidelity Co. \$1591.64;

From Globe Co. \$869.19, with local legal interest from Dec. 8, 1921, and costs herein. Judgments accordingly.

April 28, 1923.

BOURQUIN, J.

[Endorsed]: Filed April 28, 1923, Walter B. Maling, Clerk. [22]

(Title of Court and Cause.)

Stipulation and Order Extending Time to and Including June 15, 1923, for Preparation, Settlement and Allowance of Bill of Exceptions.

It is hereby stipulated by and between the parties

to the above-entitled action that the plaintiff above named may have to and including the 15th day of June, 1923, within which to prepare, serve and file its proposed bill of exceptions in the above-entitled action.

It is further stipulated that said bill of exceptions may be signed, settled and allowed by the Judge of the above-entitled court during the next ensuing term of said court, as well as during the term in which the judgment in the said action was rendered, and the jurisdiction of the above-entitled court to act upon, settle and allow such bill of exceptions is hereby extended from the present term of said court to and including the next ensuing term of said court, that is to say, to and including Monday, November 5, 1923.

Dated: San Francisco, May 4, 1923.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

REDMAN & ALEXANDER,

It is so ordered.

PARTRIDGE,
District Judge.

[Endorsed]: Filed May 7, 1923. Walter B. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[23]

(Title of Court and Cause.)

Stipulation and Order Extending Time to and Including July 15, 1923, for Preparation of Bill of Exceptions.

It is hereby stipulated by and between the parties to the above-entitled action that the plaintiff above named may have to and including the 15th day of July, 1923, within which to prepare, serve and file its proposed bill of exceptions in the above-entitled action.

Dated: San Francisco, June 4, 1923.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.
REDMAN & ALEXANDER,
Attorneys for Defendant.

It is so ordered.

VAN FLEET,
District Judge.

[Endorsed]: Filed Jun. 5, 1923. Walter B. Mal-
ing, Clerk, By J. A. Schaertzer, Deputy Clerk.
[24]

(Title of Court and Cause.)

Stipulation and Order Extending Time to and Including August 15, 1923, for Preparation, Settlement and Allowance of Bill of Exceptions.

It is hereby stipulated by and between the parties to the above-entitled action that the plaintiff above named may have to and including the 15th day of

August, 1923, within which to prepare, serve and file its proposed bill of exceptions in the above-entitled action.

Dated: San Francisco, July 3, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

REDMAN & ALEXANDER,

Attorneys for Defendant.

It is so ordered.

FRANK H. RUDKIN,

District Judge.

[Endorsed]: Filed Jul. 5, 1923. Walter B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[25]

(Title of Court and Cause.)

**Stipulation and Order Extending Time to and In-
cluding September 15, 1923, for Preparation,
Settlement and Allowance of Bill of Excep-
tions.**

It is hereby stipulated by and between the parties to the above-entitled action that the plaintiff above named may have to and including the 15th day of September, 1923, within which to prepare, serve and file its proposed bill of exceptions in the above-entitled action.

Dated: San Francisco, August 6th, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

REDMAN & ALEXANDER,

Attorneys for Defendant.

It is so ordered.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Aug. 6, 1923. Walter B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[26]

In the Southern Division of the United States Dis-
trict Court, Northern District of California,
Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Corporation,

Defendant.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corpora-
tion,

Defendant.

Bill of Exceptions.

On Wednesday, the 25th day of April, 1923, the
above-entitled actions came on regularly for trial
before the above-entitled court, the Honorable

George M. Bourquin, sitting as Judge thereof, juries having been duly waived in the manner required by law, by written stipulation filed in each of said actions in the office of the clerk of said court. Alfred Sutro, Esq., appeared as attorney for the plaintiff, L. A. Redman, Esq., as attorney for the defendant, Fidelity and Deposit Company of Maryland, and Hartley F. Peart, Esq., as attorney for the defendant Globe Indemnity Company. [27]

Thereupon the following proceedings were had:

“Mr. SUTRO.—There are two cases, I understand that the Clerk called both of them.

The COURT.—The Court understands that they are to be tried together.

Mr. SUTRO.—The understanding is that they are.

Mr. REDMAN.—That is agreeable to us; the questions involved are substantially the same. We might as well try both together.

Mr. SUTRO.—May I briefly state, your Honor, the nature of the facts in these two cases.

If your Honor please, there are two cases here, as has been stated, one against the Fidelity & Deposit Company of Maryland, and the other against the Globe Indemnity Company, the plaintiff in each case being the Java Cocoanut Oil Company, Ltd. The nature of each action is the same. The amounts involved in the two cases are a little different. The facts are few and simple, and I am going to take the liberty of reading to your Honor the allegations of the complaint, which I apprehend will not take long, and I think the time will not be wasted if I call your

Honor's attention to the facts as set out in the complaint."

Here Mr. Sutro read the allegations of the two amended complaints.

Mr. SUTRO (Continuing).—"The issues raised by the answers, I may briefly state to your Honor, are as follows: The incorporation of the plaintiff is denied. That, I understand, is waived by stipulation. Am I correct or not?

Mr. REDMAN.—Yes, we concede that.

Mr. SUTRO.—That will appear of record as waived in each action.

The COURT.—Yes." [28]

Here Mr. Sutro stated the issues raised by the respective answers of the defendants to the amended complaints.

Mr. SUTRO (Continuing).—"I would like, if your Honor please, to offer a stipulation in each action which has been made between the respective parties touching the value of the services as alleged in the complaint, that having been done to avoid the necessity of taking considerable testimony.

In the case of Fidelity Company, the stipulation reads as follows:

(Title of Court and Cause.)

'It is hereby stipulated by and between the respective parties to the above-entitled action that the sum of \$15,000 is the reasonable value of the services rendered subsequent to the 20th day of December, 1920, by Messrs. Pillsbury, Madison & Sutro as attorneys for plaintiff, in defending the original

action No. 16,430, referred to in the complaint herein, and consolidated action No. 16,430, in so far as the same relates to said original action No. 16,430.

Defendant makes this stipulation subject to the reservation that it shall not be construed as an admission by defendant that the facts stipulated to are admissible in evidence in this case, and defendant hereby objects to their admission upon the ground that they are irrelevant, immaterial and incompetent, defendant hereby stating that its position in this behalf is that the said services rendered by plaintiff's attorneys in the defense of such action were not rendered for the purpose of securing a release of the attachment levied by the plaintiff in the attachment suits, but for the purpose of defeating the claims asserted by said plaintiff in this complaint in said action, and for the purpose of establishing the counterclaims asserted by the defendant in its answer in said action. [29]

Dated: San Francisco, April 17, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

REDMAN & ALEXANDER,

Attorneys for Defendant.'

"I will ask leave to file that stipulation, and a similar stipulation in the case of the Globe Company, the amount in that case being \$10,000, and not \$15,000."

The stipulation referred to by Mr. Sutro and entered into by the Globe Indemnity Company reads as follows:

(Title of Court and Cause.)

“It is hereby stipulated by and between the respective parties to the above-entitled action that the sum of Ten Thousand Dollars (\$10,000) is the reasonable value of the services rendered subsequent on the 28th day of December, 1920, by Messrs. Pillsbury, Madison & Sutro, as attorneys for plaintiff, in defending the original action No. 16,452, referred to in the complaint herein, and consolidated action No. 16,430, in so far as the same relates to said original action No. 16,452.

Defendant makes this stipulation subject to the reservation that it shall not be construed as an admission by defendant that the facts stipulated to are admissible in evidence in this case, and defendant hereby objects to their admission upon the ground that they are irrelevant, immaterial and incompetent, defendant hereby stating that its position in this behalf is that the said services rendered by plaintiff's attorneys in the defense of such action were not rendered for the purpose of securing a release of the attachment levied by the plaintiff in the attachment suit, but for the purpose of defeating the claims asserted by said plaintiff in its complaint in said action and for the purpose of establishing the counterclaims asserted by the defendant in its answer in said action.

Dated: San Francisco, April 17, 1923. [30]

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

HARTLEY F. PEART,

Attorney for Defendant.”

Both of the foregoing stipulations were duly filed in open court with the clerk of said court.

Mr. SUTRO (Continuing).—"I would now, if your Honor please, like to offer the Marshal's return on attachment in each of these two cases. These are certified copies, if you care to see them.

Mr. REDMAN.—Yes, I would like to see them. (After examination.) We have no objection. No objection.

The COURT.—They will be admitted."

The documents were marked Plaintiff's Exhibits Nos. 1 and 2.

Plaintiff's Exhibit No. 1 is as follows:

Plaintiff's Exhibit No. 1.

**"UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.**

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal for the Northern District of California, do hereby certify and return that I received the hereunto annexed writ of attachment on the 7th day of December, 1920, and by virtue thereof I have attached all moneys, goods, credits, effects, debts due or owing, or any personal property in the possession or under the control of Wells Fargo Nevada National Bank, San Francisco, California, belonging to the above-named defendants, Java Cocoanut Oil Company, Ltd., a corporation, or Oliefabrieken Insulinde, N. V., a corporation, or either of them, or owned by them or either of them in their possession or in their pos-

session as trustee, or as agent, or under their control as trustee or as agent, for said defendants, or either of them, or for the Nederlandsche Handel Maatschappij, and any and all warehouse receipts, bills of lading, or negotiable or non-negotiable evidences of title to copra cake, copra cake meal, or copra cake oil, or any other personal property now in your possession belonging to said defendants or either of them, or in your possession as trustee or as agent for said defendants or either of them, or in your possession or custody as trustee or as agent for the Nederlandsche Handel Maatschappij; said attachment being made by handing to and leaving with R. L. Cofer, Vice-president of Wells Fargo Nevada National Bank, personally, at San Francisco, a copy of this Writ on December 7, 1920. I also notified said Bank not to pay over or transfer the same to anyone but myself. I also required from said Bank a statement in writing of the amount of the same, to which notice I have received no reply.

Dated: San Francisco, California, December 24, 1920. [31]

J. B. HOLOHAN,
United States Marshal Northern District of California.

By H. Maguire,
Salaried Deputy.

UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal for the Northern District of California, do hereby certify and return that I received the hereunto annexed writ of attachment on the 7th day of December, 1920, and by virtue thereof I have duly attached all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of the Pacific Oil and Lead Company of San Francisco, California, by handing to and leaving with R. R. Strange, manager of said company, personally, in the city and county of San Francisco, California, on the 20th day of December, 1920, a copy of said writ of attachment with a notice in writing indorsed thereon that said property was attached by virtue of said writ and not to pay over the same to anyone but myself. I also demanded a statement in writing of the same to which I received the following answer:

PACIFIC OIL AND LEAD WORKS,
155 Townsend Street,
San Francisco.

Dec. 22, 1920.

Mr. J. B. Holohan, U. S. Marshal,
Post Office Building,
San Francisco, Cal.

Dear Sir:

We were served yesterday with a Writ of Attachment in the case of Warren R. Porter vs. Java Cocoanut Oil Co. We beg to advise that we have no monies, goods, credits, effects or debts or any personal property of any kind or nature belonging to the Java Cocoanut Oil Company, Ltd., or the Olie-fabrieken Insulinde, N. V. in our possession.

Very truly yours,

Manager.

RRS/MED.

I further return that a bond having been given for the release of this attachment by the defendant Java Cocoanut Oil Company., Ltd., I released said attachment accordingly.

Dated: San Francisco, California, December 24, 1920.

J. B. HOLOHAN,
United States Marshal, Northern District of California.

By H. Maguire,
Salaried Deputy. [32]

PACIFIC OIL AND LEAD WORKS,

San Francisco—Los Angeles,

155 Townsend Street.

San Francisco, Dec. 22, 1920.

Mr. J. B. O'Holohan, U. S. Marshal,

Post Office Building,

San Francisco, Cal.

Dear Sir:

We were served yesterday with a Writ of Attachment in the case of Warren R. Porter vs. Java Coconut Oil Co.

We beg to advise that we have no monies, goods, credits, effects or debts or any personal property of any kind or nature belonging to the Java Coconut Oil Company, Ltd. or the Oliefabrieken Insulinde, N. V. in our possession.

Very truly yours,

Manager.

RRS/MED.

UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal for the Northern District of California, do hereby certify and return that I received the hereunto annexed writ of attachment on the 7th day of December, 1920, and by virtue thereof I have duly attached all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to the de-

fendants therein named, or either of them, in the possession or under the control of the Frenzel-Payne Company of San Francisco, California, by handing to and leaving with H. S. Kinsell, secretary and treasurer of said company, personally, in the city and county of San Francisco, California, on the 20th day of December, 1920, a copy of said writ of attachment with a notice in writing indorsed thereon that said property was attached by virtue of said writ and not to pay over the same to anyone but myself. I also demanded a statement in writing of the same to which I received the following answer:

FRENZEL-PAYNE COMPANY,
311 California Street,
San Francisco, Calif.

Dec. 22, 1920.

Mr. J. B. Holohan,
United States Marshal,
Northern District of Calif.,
San Francisco, Calif.

Sir:

In accordance with conditions of writ of attachment filed on property belonging to the Java Coconut Oil Co., Ltd., in connection with suit against them by Warren R. Porter, as the Porter Trading Co., San Francisco, this will confirm that we have on hand at the present time, and had on hand at the time notice of attachment was handed us, approximately 19224 bags of net weight of 100 pounds each, containing Copra Meal. This represents a

total of 961.2 tons of 2000 lbs. each. No withdrawals or deliveries have been made by us to or no order *order* [33] of the Java Cocoanut Oil Co., Ltd., since Dec. 20, 1920, against this material unpaid storage and milling charges due us amount to \$675.64.

We have no other moneys, goods, credits, effects, debts due or owing them, or personal property, in our possession belonging to the Java Cocoanut Oil Co., Ltd., or to the Oliefabrieken Insulinde N. V.

Very truly yours,

FRENZEL PAYNE CO.,

E. A. FRENZEL,

President.

I further return that a bond having been given for the release of this attachment by the defendant Java Cocoanut Oil Company, Ltd., I released said attachment accordingly.

Dated: San Francisco, California, December 24, 1920.

J. B. HOLOHAN,

United States Marshal, Northern District of California.

By H. Maguire,
Salaried Deputy.

FRENZEL-PAYNE COMPANY,
INCORPORATED,
311 California Street.
Phone Kearny 459.

Import
Export
Commission.

San Francisco, Calif., Dec. 22, 1920.

Writ of Attachment.

Java Coconut Oil Co., Ltd.,
Materials on Hand.

Mr. J. B. Holohan,
United States Marshal,
Northern District of Calif.,
San Francisco, Cal.

Sir:

In accordance with conditions of writ of attachment filed on property belonging to the Java Coconut Oil Co., Ltd., in connection with suit against them by Warren R. Porter, as the Porter Trading Co., San Francisco, this will confirm that we have on hand at the present time, and had on hand at the time notice of attachment was handed us, approximately 19224 bags of net weight of 100 pounds each, containing Copra Meal. This represents a total of 961.2 tons of 2000 lbs. each. No withdrawals or deliveries have been made by us to or on order of the Java Coconut Oil Co., Ltd., since Dec. 20, 1920. Against this material unpaid storage and milling charges due us amount to \$675.64.

We have no other moneys, goods, credits, effects,

debts due or owing them, or personal property, in our possession belonging to the Java Cocoanut Oil Co., Ltd., or to the Oliefabrieken Insulinde N. V.

Very truly yours,

FRENZEL PAYNE CO.,

By E. A. FRENZEL,

President. [34]

UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal for the Northern District of California, do hereby certify and return that I received the hereunto annexed writ of attachment on the 7th day of December, 1920, and by virtue thereof I have duly attached all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of The Consolidated Milling Company, of San Francisco, California, by handing to and leaving with James W. Means, partner of said company, personally, in the city and county of San Francisco, California, on the 20th day of December, 1920, a copy of said writ of attachment, with a notice in writing indorsed thereon that said property was attached by virtue of said writ and not to pay over the same to anyone but myself. I also demanded a statement in writing of the amount of the same to which I received no reply.

I further return that a bond having been given for the release of this attachment by the defendant Java Cocoanut Oil Company, Ltd., I released said attachment accordingly.

Dated: December 24, 1920, at San Francisco, Cal.

J. B. HOLOHAN,

United States Marshal Northern District of California.

By H. Maguire,
Salaried Deputy.

NOLAN MILL & FEED CO., INC.,

Dealers in

Rice and Soya Bean Flour and By-Products.

631 Brannan Street.

San Francisco, December 23, 1920.

J. B. Holohan,

United States Marshal,

Northern District of California.

Dear Sir:

You will please take notice that we are not in possession of any money, goods, credits or effects belonging to the Java Cocoanut Oil Co., Ltd., or to Oliefabrieken Insulinde, N. V. nor have we any debts due or owing them.

NOLAN MILL & FEED CO.

H. J. Schaeffle,
Secty. [35]

UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal for the Northern District of California, do hereby certify and return that I received the hereunto annexed writ of attachment on the 7th day of December, 1920, and by virtue thereof I have duly attached all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of the Golden Gate Milling Co., of San Francisco, California, by handing to and leaving with C. C. Peterson, treasurer of said company, personally, in the city and county of San Francisco, California, on the 20th day of December, 1920, a copy of said writ of attachment, with a notice in writing indorsed thereon that said property was attached by virtue of said writ and not to pay over the same to anyone but myself. I also demanded a statement in writing of the amount of the same to which I received a letter from the San Francisco Milling Co., Inc., reading as follows:

San Francisco, Cal. Dec. 24, 1920.

United States Marshal,
Post Office Bldg., S. F.

Dear Sir:

In reference to notice of attachment, heretofore served, we wish to inform you that we have no

money, goods, credits, effects or debts, due or owing, or any personal property, in our possession or under our control, belonging to Oliefabrieken Insulinde, N. V., and that we have no money, goods, credits, effects or debts, due or owing, in our possession or under our control, belonging to Java Cocoanut Oil Co., Ltd., other than 717 tons of copra cake meal belonging to Java Cocoanut Oil Co. Ltd.

Yours truly,

SAN FRANCISCO MILLING CO., Ltd.

S. STEVENTON,

Sec.

SS:M.

I further return that a bond having been given for the release of this attachment by the defendant Java Cocoanut Oil Company, Ltd., I released said attachment accordingly.

Dated: San Francisco, California, December 24, 1920.

J. B. HOLOHAN,

United States Marshal Northern District of California.

By H. Maguire,
Salaried Deputy.

SAN FRANCISCO MILLING CO., INC.

Our Specialties:

Liberty Brand Flour.

Chicken Rolled Barley.

Rolled Oats, Ground Barley, Egyptian Corn, Milo
Maize and All Feeds.

San Francisco, Cal., Dec. 24, 1920.

United States Marshal,

Post Office Bldg., S. F.

Dear Sir:

In reference to notice of attachment, heretofore served, we wish to inform you that we have no money, goods, credits, effects or debts, due or owing, or any personal property, in our possession or under our control, belonging to Oliefabrieken [36] Insulinde, N. V., and that we have no money, goods, credits, effects or debts, due or owing, in our possession or under our control, belonging to Java Cocoanut Oil Co., Ltd., other than 717 tons of copra cake meal belonging to Java Cocoanut Oil Co., Ltd.

Yours truly,

SAN FRANCISCO MILLING CO., Ltd.

S. STEVENTON,

Sec.

SS:M.

UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal for the

Northern District of California, do hereby certify and return that I received the hereunto annexed writ of attachment on the 7th day of December, 1920, and by virtue thereof I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of the Associated Terminals Company of San Francisco, California, by handing to and leaving with D. Chidester, manager and acting secretary of said corporation, personally, in the city and county of San Francisco, California, on the 18th day of December, 1920, a copy of said writ of attachment, with a notice in writing indorsed thereon that said property was attached by virtue of said writ and not to pay over the same to anyone but myself. I also demanded a statement in writing of the same to which I received the following answer:

ASSOCIATED TERMINALS CO.

San Francisco, Dec. 22, 1920.

Mr. J. B. Holohan, U. S. Marshal,
Northern District of California,
7th and Mission Sts.,
San Francisco, Cal.
File 1237-374-632.

Sir:

In regard to the writ of attachment in the action of Warren R. Porter, doing business under the name and style Porter Trading Co., Plaintiff, vs. Java Cocoanut Oil Company, Ltd., a corporation,

and Oliefabrieken Insulinde, N. V., a corporation, Defendant, you are hereby notified that we have no moneys, goods, credits, effects or debts due or owing, or any personal property in our possession or under our control belonging to the Defendant, under the above-entitled action.

Yours truly,

ASSOCIATED TERMINALS COMPANY.

Per W. E. KROPP,

Auditor.

WEK/AW.

I further return that a bond having been given for the release of this attachment by the defendant Java Cocoanut Oil Company, Ltd., I released said attachment accordingly.

Dated: San Francisco, California, December 24, 1920.

J. B. HOLOHAN,

United States Marshal Northern District of California.

By I. W. Grover,
Salaried Deputy. [37]

ASSOCIATED TERMINALS CO.

San Francisco—Sacramento.

San Francisco, Dec. 22, 1920.

Mr. J. B. Holohan, U. S. Marshal,
Northern District of California,
7th and Mission Sts.,
San Francisco, Cal.
File 1237-374-632.

Sir:

In regard to the writ of attachment in the action of Warren R. Porter, doing business under the name and style Porter Trading Co., Plaintiff, vs. Java Coconut Oil Company, Ltd., a corporation, and Oliefabrieken Insulinde, N. V., a corporation, Defendant, you are hereby notified that we have no moneys, goods, credits, effects or debts due or owing, or any personal property in our possession or under our control belonging to the Defendant, under the above-entitled action.

Yours truly,

ASSOCIATED TERMINALS COMPANY.

Per W. E. KROPP,

Auditor.

WEK/AW.

UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal for the
Northern District of California, do hereby certify

and return that I received the hereunto annexed writ of attachment on the 7th day of December, 1920, and by virtue thereof I have duly attached all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of George Beanston, of San Francisco, California, personally, on the 20th day of December, 1920, a copy of said writ of attachment, with a notice in writing indorsed thereon that said property was attached by virtue of said writ and not to pay over the same to anyone but myself. I also demanded a statement in writing of the amount of the same to which I received no reply.

I further return that a bond having been given for the release of this attachment by the defendant Java Coconut Oil Company, Ltd., I released said attachment accordingly.

Dated: December 24, 1920, at San Francisco, Cal.

J. B. HOLOHAN,

United States Marshal Northern District of California.

By H. Maguire,

Salaried Deputy. [38]

UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal for the Northern District of California, do hereby certify

and return that I received the hereunto annexed writ of attachment on the 7th day of December, 1920, and by virtue thereof I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of the Wells Fargo Nevada National Bank of San Francisco, California, by handing to and leaving with L. R. Cofer, vice-president of said bank, personally, in the city and county of San Francisco, California, on the 18th day of December, 1920, a copy of said writ of attachment, with a notice in writing indorsed thereon that said property was attached by virtue of said writ and not to pay over the same to anyone but myself. I also demanded a statement in writing of the same to which I received the following answer:

‘WELLS FARGO NEVADA NATIONAL BANK,
Of San Francisco.

San Francisco, December 18, 1920.

Mr. J. B. Holohan, United States Marshal,
Northern District of California,
San Francisco.

Dear Sir:

This will acknowledge your Writ of Attachment, —Warren R. Porter, vs. Java Cocoanut Oil Company, Ltd., a corporation, and Oliefabrieken Insulinde, N. V.

All property of the Java Cocoanut Oil Company, Ltd., in our possession, has been pledged to us on

account of monies advanced to said company, greater than the value of all securities in our hands.

We have on our books a credit balance of the Oliefabrieken Insulinde, of \$540.85, but as said Oliefabrieken Insulinde are guarantors to us for the liabilities of the Java Coconut Oil Company, Ltd., we look upon this balance as being pledged also on account of their liability to us.

Sincerely yours,

L. R. COFER,

Vice-president.

LRC: JBW.

I further return that a bond having been given for the release of this attachment by the defendant Java Coconut Oil Company, Ltd., I released said attachment accordingly.

Dated: San Francisco, California, December 24, 1920.

J. B. HOLOHAN,

United States Marshal Northern District of California.

By I. W. Grover,

Salaried Deputy. [39]

WELLS FARGO NEVADA NATIONAL BANK
of San Francisco.

Established 1852.

San Francisco December 18, 1920.

Mr. J. B. Holohan, United States Marshal,
Northern District of California,
San Francisco.

Dear Sir:

This will acknowledge your Writ of Attachment,
—Warren R. Porter vs. Java Cocoanut Oil Com-
pany, Ltd., a corporation, and Oliefabrieken Insu-
linde, N. V.

All property of the Java Cocoanut Oil Company,
Ltd., in our possession, has been pledged to us on ac-
count of monies advanced to said company, greater
than the value of all securities in our hands.

We have on our books a credit balance of the
Oliefabrieken Insulinde, of \$540.85, but as said Olie-
fabrieken Insulinde are guarantors to us for the
liabilities of the Java-Cocoanut Oil Company, Ltd.,
we look upon this balance as being pledged also on
account of their liability to us.

Sincerely yours,

L. R. COFER,

Vice-president.

LRC: JBW.

UNITED STATES OF AMERICA,
Northern District of California.

In the District Court of the United States for the
Northern District of California, Second Division.

WARREN R. PORTER, Doing Business Under the
Name and Style of PORTER TRADING
COMPANY,

Plaintiff,

vs.

JAVA COCOANUT OIL COMPANY, LTD. a
Corporation, and OLIENFABRIEKEN INSULINDE, N. V., a Corporation,

Defendants.

WRIT OF ATTACHMENT.

The President of the United States of America, To
the Marshal of the Northern District of California, GREETING:

WHEREAS, the above-entitled action was commenced in the District Court of the United States for the Northern District of California, by the above-named plaintiff to recover from the said defendants the sum of \$143,566.25 or thereabouts, besides interest and cost of suit, and the necessary affidavit and undertaking herein having been filed as required by law:

Now, we do therefore command you, the said Marshal, that you attach and safely keep all the property of the said Defendants or either of them, within

your said District (not exempt from execution), or so much thereof as may be sufficient to satisfy the said Plaintiff's demand, as above-mentioned; unless the said defendants give you security, by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness, the Honorable WILLIAM C. VAN FLEET, Judge of the District Court of the United States, Northern [40] District of California, this 7th day of December in the year of our Lord one thousand nine hundred and twenty and of our Independence the 145th.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

Rec'd at U. S. Marshal's Office, San Francisco,
Dec. 7, 1920 at 11:30 A. M.

J. B. HOLOHAN,
U. S. Marshal,
By Geo. H. Burnham,
Ch. Salaried Deputy.

[Endorsed]: Filed Jan. 4, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk.

WARREN S. PORTER, etc.,

vs.

JAVA COCOANUT OIL CO. LTD. et al.

No. 16430.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of the original Writ of Attachment together with the Marshal's Returns attached thereto filed January 4, 1921, in the above-entitled cause, as the same remains of record and on file in the office of the Clerk of said Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 21st day of April A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: No. 16430. Warren R. Porter vs. Java Cocoanut Oil Co. Ltd. Marshal's Return on Attachment. Certified Copy. No. 16715 & 16716. U. S. District Court, Nor. Dist. Calif. Plff. Exhibit 1. Filed 4/25/23. Maling, Clerk."

Plaintiff's Exhibit No. 2 is as follows:

Plaintiff's Exhibit No. 2.**"UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.**

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal of the Northern District of California, do hereby certify and return that I received the hereunto annexed writ of attachment on the 28th day of December, 1920, and by virtue thereof I have duly attached all moneys, goods, credits, effects, debts due or owing, or any personal property, belonging to the defendants therein named, or either of them, in the possession or under the control of Frenzel-Payne Company, by delivering to and leaving with E. A. Frenzel, President of said Frenzel-Payne Company, personally, in the City and County of San Francisco, State of California, on the 28th day of December, 1920, a copy of said writ of attachment [41] with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to anyone but myself. I also demanded a statement in writing of the amount of the same, to which I received the following answer:

FRENZEL-PAYNE COMPANY.

San Francisco, Calif., Dec. 28, 1920.

Writ of Attachment.

Java Cocoanut Oil Co., Ltd.

No. 16452—\$27,500.00

Mr. J. B. Holohan,

United States Marshal,

Northern District of California,

San Francisco Cal.,

Sir:

In accordance with writ of attachment in case of Warren R. Porter vs. Java Cocoanut Oil Co., Ltd. No. 16452, this to advise that we have on hand at the present time, which is to the best of our knowledge and belief the property of the Java Cocoanut Oil Co., Ltd., 19221 bags of net weight of 100# each, containing copra meal. This represents a total of 961.05 tons of 2000# per ton.

Against this material we have unpaid storage and milling charges due us amounting to \$675.64.

We have no other moneys, goods, credits, effects, debts due or owing them, or personal property, in our possession belonging to the Java Cocoanut Oil Co., Ltd., or to the Oliefabriken Insulinde, N. V.

Very truly yours,

FRENZEL PAYNE CO.,

E. A. FRENZEL,

President.

I further return that a bond having been given by the defendant on the 30th day of December, 1920

60 *Java Coconut Oil Company, Ltd. vs.*

for the release of the above attachment, I have released the same accordingly.

J. B. HOLOHAN,
U. S. Marshal.
By G. O. White,
Deputy.

(Letter-head.)

FRENZEL-PAYNE COMPANY,

INCORPORATED.

311 California Street.

Phone Kearny 459.

San Francisco, Calif., Dec. 28, 1920.

Writ of Attachment.

Java Coconut Oil Co., Ltd.,

No. 16452—\$27,500.00

Mr. J. B. Holohan,
United States Marshal,
Northern District of Calif.,
San Francisco, Cal.,

Sir:

In accordance with writ of attachment in case of Warren R. Porter vs. Java Coconut Oil Co., Ltd., No. 16452, this to advise that we have on hand at the present time, which is to the best of our knowledge and belief the property of the [42] Java Coconut Oil Co., Ltd., 19221 bags of net weight of 100# each, containing copra meal. This represents a total of 961.05 tons of 2000# per ton.

Against this material we have unpaid storage and milling charges due us amounting to \$675.64.

We have no other moneys, goods, credits, effects, debts due or owing them, or personal property, in our possession belonging to the Java Cocoanut Oil Co., Ltd., or to the Oliefabriken Insulinde N. V.

Very truly yours,
FRENZEL PAYNE CO.,
E. A. FRENZEL,

President.

UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal of the Northern District of California, do hereby certify and return that I received the hereunto annexed writ of attachment on the 28th day of December, 1920, and by virtue thereof I have duly attached all moneys, goods, credits, effects, debts due or owing or any personal property, all bills of lading, warehouse certificates, trust receipts, certificates of deposit, certified checks of any negotiable or non-negotiable evidence of title, copra cake, copra cake meal, cocoanut oil, and any and all documents showing and or giving title to said defendants, Java Cocoanut Oil Company, Ltd., a corporation, and Oliefabriken Insulinde, N. V., a corporation, or either of them to any personal property whether in the name of said defendants or either of them or in the name of Nederlandsche Handel Maatschappij, or in the name of the Wells Fargo Nevada National Bank, or in the name of said Nederland-

sehe Handel Maatschapij, as trustees, belonging to the defendants therein named, or either of them, in the possession or under the control of Wells Fargo Nevada National Bank, by delivering to and leaving with L. R. Cofer, Vice President of said Wells Fargo Nevada National Bank, personally, in the city and county of San Francisco, State of California, on the 28th day of December, 1920, a copy of said writ of attachment with an notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to anyone but myself. I also demanded a statement in writing of the amount of the same, to which said Wells Fargo National Bank has failed, neglected and refused to answer.

I further return that a bond having been given by the defendant on the 30th day of December, 1920, for the release of the above attachment, I have released the same accordingly.

J. B. HOLOHAN,

Marshal.

By G. O. White

Deputy.

UNITED STATES MARSHAL'S RETURN ON
ATTACHMENT.

United States Marshal's Office,
Northern District of California,—ss.

I, J. B. Holohan, United States Marshal of the Northern District of California, do hereby certify and return that I received the hereunto annexed

writ of attachment on the 28th day of December, 1920, and by virtue thereof I have duly attached all moneys, goods, credits, effects, debts due or owing, or any personal property, belonging to the defendants therein named, or either of them, in the possession or under the control of San [43] Francisco Milling Company, by delivering to and leaving with C. C. Peterson, Treasurer of said San Francisco Milling Company, personally, in the city and county of San Francisco, State of California, on the 28th day of December, 1920, a copy of said writ of attachment with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to anyone but myself. I also demanded a statement in writing of the amount of the same, to which said San Francisco Milling Company has failed, neglected and refused to answer.

I further return that a bond having been given by the defendant on the 30th day of December, 1920, for the release of the above attachment, I have released the same accordingly.

J. B. HOLOHAN,

U. S. Marshal.

By Robert G. Anderson,

Deputy.

United States of America,
Northern District of California.

In the District Court of the United States for the
Northern District of California, Second Division.

WARREN R. PORTER, etc.,

Plaintiff,

vs.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation, and OLIEFABRIEKEN INSULINDE, N. V., a Corporation,

Defendants.

WRIT OF ATTACHMENT.

The President of the United States of America, to the Marshal of the Northern District of California, GREETING:

WHEREAS, the above-entitled action was commenced in the District Court of the United States for the Northern District of California, by the above-named plaintiff to recover from the said defendant the sum of \$27,500.00 or thereabouts, besides interest and cost of suit, and the necessary affidavit and undertaking herein having been filed as required by law:

NOW, we do therefore command you, the said Marshal, that you attach and safely keep all the property of the said defendants or either of them, within your said District (not exempt from execution), or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above men-

tioned; unless the said defendants give you security, by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of the District Court of the United States, Northern District of California, this 28th day of December, in the year of our Lord one thousand nine hundred and twenty, and of our Independence the 145th.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Received at U. S. Marshal's Office December 28/20, at 3:30 P. M. J. B. Holohan, U. S. Marshal. By Geo. H. Burnham, Ch. Salaried Deputy. [44]

No. 16,452.

WARREN R. PORTER, etc.,

vs.

JAVA COCOANUT OIL CO., LTD. et al.

United States of America,

Northern District of California,

City and County of San Francisco,—ss.

I Walter B. Maling, Clerk of the United States

District Court for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of the original writ of attachment together with the Marshal's returns attached thereto filed January 4, 1921, in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 21st day of April, A. D. 1923.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Filed Jan. 4, 1921. W. B. Maling, Clerk. By
J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 16,452. Warren R. Porter vs.
Java Cocoanut Oil Co., Ltd. Marshal's Return on
Attachment. Certified Copy. No. 16,715 & 16,716.
U. S. Dist. Court Nor. Dist. Calif. Plff. Exhibit 2.
Filed 4/25/23. Maling, Clerk."

“Mr. SUTRO.—Now, if your Honor please, I
would like to offer in evidence a certified copy of
the order consolidating for trial the four cases
which I have mentioned.

Mr. REDMAN.—No objection to that.

Mr. PEART.—No objection.

The COURT.—It will be admitted.

Mr. SUTRO.—That may be considered as being
offered in each case; there is only one copy.

Mr. REDMAN.—Yes.

The COURT.—That may be understood.”

The document in question, Plaintiff's Exhibit No. 3, is as follows:

Plaintiff's Exhibit No. 3.

“At a stated term, to wit, the November Term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday the 21st day of November, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable MAURICE T. DOOLING, District Judge. [45]

No. 16,430.

WARREN R. PORTER etc.

vs.

JAVA COCOANUT OIL CO.

No. 16,452.

WARREN R. PORTER etc.

vs.

JAVA COCOANUT OIL CO.

No. 16,498.

JAVA COCOANUT OIL CO.

vs.

WARREN R. PORTER etc.

No. 16,518.

JAVA COCOANUT OIL CO.

vs.

WARREN R. PORTER etc.

Ordered that the four above-entitled actions be and they are hereby consolidated under the title of Warren R. Porter, doing business under the name and style of Porter Trading Company, Plaintiff, versus Java Cocoanut Oil Co., Ltd., a corporation, Defendant No. 16,430.

[Endorsed]: I hereby certify that the foregoing is a full, true and correct copy of an Original Order made and entered in the therein entitled cause.

ATTEST my hand and the seal of said District Court this 24th day of April A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk."

Mr. SUTRO.—I think I had better be sworn.

Testimony of Alfred Sutro, for Plaintiff.

ALFRED SUTRO, a witness on behalf of the plaintiff, was called and being duly sworn, testified as follows:

"In the four actions that were pending in this Court between Porter and the Java Cocoanut Oil Company there were involved five contracts for the purchase by Porter from the Java Cocoanut Oil Company of copra cake. I have here duplicate

(Testimony of Alfred Sutro.)

copies of the five contracts. I would like to offer them in evidence.

I will state, your Honor, the purpose of it is, it is denied in the answer, here, that these actions, which were consolidated for trial by his Honor, Judge Dooling, arose out of the same transaction, and I am offering these contracts." [46]

"The COURT.—I think that is foreclosed by the order of consolidation. We will never go back of that order.

A. If that is your Honor's view I do not care to offer them at all. That was our view.

The COURT.—It cannot be questioned here.

A. I will say that on September 3, 1921, the Java Coconut Oil Company paid my firm for services in the litigation between Porter and itself arising out of the transactions involved in the four complaints the sum of \$4000; on December 10, 1921, the further sum of \$10,000 for the same services; on January 16, 1922, the sum of \$15,000; those three sums aggregate altogether the sum of \$29,000. That is all of my testimony for the present.

The COURT.—Any cross-examination?

Mr. REDMAN.—Just a minute. No cross-examination."

Testimony of E. M. Prince, for Plaintiff.

E. M. PRINCE, a witness on behalf of the plaintiff, was called and being duly sworn testified as follows:

Direct Examination by Mr. SUTRO.

I am a resident of Alameda County and by pro-

(Testimony of E. M. Prince.)

fession a lawyer. I have been admitted to the bar nearly five years and have been practicing about three. I am associated in the practice of my profession with the firm of Pillsbury, Madison, & Sutro, and have been for nearly three years. This was my first association. Mr. Alfred Sutro, yourself, on behalf of the firm of Pillsbury, Madison & Sutro, had charge of the litigation on behalf of the Java Coconut Oil Company, between that Company and Warren R. Porter, arising out of the purchase by Porter of certain copra cake from the Java Coconut Oil Company. From the beginning I assisted you in that litigation and took an active part in everything that was done in it. I also assisted in the trial from beginning to end. [47]

“Mr. SUTRO.—I had prepared a number of questions to show the fact that these actions arose out of the same transaction, but I understand that we need not go into that.

The COURT.—I think not.

Mr. SUTRO.—Q. Mr. Prince, in each of the two suits in which the Surety Companies we are now suing furnished bonds after attachments were levied, did you examine the attachments with me at the time to see whether or not they were regular on their face? A. I did.

Q. Were they regular, in your opinion?

A. They were.

Q. Was there any chance of defeating those attachments by moving for a dissolution?

Mr. PEART.—We object to this line of testi-

mony upon the ground that the record of the case is the best evidence of whether or not they are regular on their face.

The COURT.—I think so.

Mr. SUTRO.—I might say to your Honor that I am asking the witness as an expert witness, as an attorney.

The COURT.—Well, the Court—

Mr. SUTRO.—Would your Honor indulge me a moment? This will not be long.

The COURT.—I know, but does the Court ever take the testimony of expert lawyers on what the law is. It may on foreign law, but I doubt it on such matters as this. Your documents are here before us. Whether there are any facts that would warrant their dissolution would either depend on the documents, themselves, or on some extraneous matter of fact.

Mr. SUTRO.—We won't go into it, then.

The COURT.—Proceed. I hardly see the necessity of it.

Mr. SUTRO.—We are doing it out of an abundance of caution. We offer the attachments so as to overcome the suggestion which might be made by them that they could have been dissolved. We want to show your Honor that we have carefully [48] considered that, and they could not be dissolved.

The COURT.—He may answer briefly; in so far as it is not competent, the Court will not, in its opinion, give it any consideration, or in so far as not material.

Mr. SUTRO.—Q. Answer the question. Read it, Mr. Reporter.

(Last question repeated by the reporter.)

A. In our opinion there was no chance.

Q. Was there any way of getting rid of these attachments, except by defending the case? [49]

A. In our opinion, there was no way except by defending the suits."

The WITNESS (Continuing).—The amount of costs awarded to Java Coccoanut Oil Company, Ltd., in action No. 16,430 was \$1591.64. That amount has not been paid by the Fidelity Company to the plaintiff. In the case against the Globe Company the amount of costs is \$869.19 [50] and that amount has not been paid by the Globe Company.

Mr. SUTRO.—You may cross-examine.

Mr. PEART.—No cross-examination.

Mr. REDMAN.—No cross-examination.

Testimony of Alfred Sutro, for Plaintiff.

Mr. SUTRO.—I would like to state, if your Honor please, as a part of my testimony, the facts set up in paragraph III of the second cause of action of the Fidelity Suit, as follows:

"For the services of my firm in the original case, 16,430, and consolidated action No. 16,430, plaintiff paid my firm sums in excess of \$25,000, of which the sum of \$15,000 was paid for services that the firm rendered plaintiff subsequent to the issuance of the attachment, and to secure the dissolution thereof; that is to say, that plaintiff paid the sum of \$15,000 to my firm for services rendered by my firm subsequent to the 6th day of December, 1920, in defend-

Testimony of Alfred Sutro.))

ing original action No. 16,430, and consolidated action No. 16,430, in so far as the same related to the original action 16,430.

The COURT.—Do I understand you are reading from the complaint?

A. I am stating these facts as alleged. That no part of the sum of \$15,000 was paid my firm for services in or in connection with action No. 16,452, 16,498 and 16,518, or any thereof, or for services in consolidated action 16,430 relating to the last three actions, or any thereof; that no part of that sum has been paid by the defendant Fidelity Company to plaintiff.

May it be stipulated that I make the same statement with reference to the Globe Company, so far as \$10,000 is concerned?

Mr. PEART.—Yes.

The WITNESS.—That is all.” [51]

Cross-examination.

“By Mr. PEART.—Q. Mr. Sutro, the amount that you have specified aggregates the sum of \$25,000?

A. To which amount have you reference?

Q. The amounts paid you for services in securing the dissolution of the two attachments.

A. I specified the sum of \$15,000 as the amount paid my firm by the plaintiff in the case of the Fidelity & Deposit Company for defending action 16,430 after the levy of the attachment, and securing the dissolution thereof, as stated in my testimony; and the same statement by stipulation with

(Testimony of Alfred Sutro.)

you is made so far as the Globe Company is concerned, except the sum of \$10,000 is the amount paid, and the action is 16,452 and not 16,430.

Q. The plaintiff paid you in all for this litigation, for services in the litigation, in the four cases, the sum of \$29,000, I think your testimony is?

A. No.

Q. Pardon me. The sum of \$4,000, September 3, 1921, the sum of \$10,000 December 10, 1921, and the sum of \$15,000 on January 16, 1922?

A. Yes.

Q. When did the plaintiff, the Java Cocoanut Oil Company, first consult you, Mr. Sutro, in reference to any matters in dispute between that company and Mr. Porter?

A. My recollection is that it was sometime in August, 1920—I could fix the date absolutely by reference to a jury trial which I had in this court, his Honor Judge Van Fleet, I think, presiding, and it was when I came out of court that day, I believe it was in August, 1920, that Mr. Clements, on behalf of the plaintiff, came to see me and told me of the difficulties that he was having with Mr. Porter.

Q. Did the Java Cocoanut Oil Company at that time discuss with you claims which it asserted against Porter? A. It certainly did.

Q. And those claims aggregated substantially the amount of the judgment that the Java Cocoanut Oil Company finally recovered against Porter in the consolidated action No. 16,430?

(Testimony of Alfred Sutro.)

A. They did not. [52]

Q. Were they in excess of that sum?

A. They nowhere approached that sum.

Q. What amount was the Java Cocoanut Oil Company claiming against Porter at the time they first consulted you?

A. That would be impossible for me to tell you. I can state this, however, that will give you some idea, that after Mr. Porter filed his first complaint, which was action 16,430, and which was brought to recover damages for an alleged breach of contract or contracts on the part of the Java Company, the Java Company filed an answer and cross-complaint, counterclaims and cross-complaint, the counterclaims and cross-complaint being, as far as I now remember, practically identical, except one was styled a cross-complaint and the other a counterclaim; and in that counterclaim the Java Company was suing Porter for, I think, a little over \$189,000 for cake which it had delivered to Porter and for which he had not paid.

Q. Had the cake been delivered to Porter prior to the time that the Java Company first consulted with you? A. Some of the cake had been.

Q. Were there deliveries of cake subsequent to the time that the Java Cocoanut Oil Company consulted you?

A. I could tell you with a good deal of absolute accuracy by reference to a photographic copy of a chart which was 30 feet long and about 6 feet high, which we had made, and which showed all

(Testimony of Alfred Sutro.)

of these transactions. If you want to get at the facts and let me refer to that chart—read that question. (Last question repeated by the reporter.) Do you want to see this?

Q. No, just refresh your recollection from the chart, Mr. Sutro.

A. Before answering your question, do you want to see it, I am asking you?

Q. No.

Mr. PEART.—Q. Mr. Sutro, how often did you have conferences with any representative of the Java Coconut Oil Company prior to the institution of any litigation between that company and [53] Porter?

A. That would be hard to answer, Mr. Peart. My recollection is that very soon after Mr. Porter started his first suit Mr. Clements, president of the company, who had come out here on account of the repudiation of these contracts by Porter, left again for New York, and to tell you how many times I saw Mr. Clements would just be a guess and of no value.

Q. Were you in correspondence with him after his return to New York in regard to the matter?

A. Oh, yes.

Q. Mr. Porter had, as I understand you, repudiated certain contracts at that time existing between him and the Java Coconut Oil Company, at the time you were first consulted? A. Yes.

Q. And those contracts were the basis of the counterclaim and cross-complaint filed by the Java

(Testimony of Alfred Sutro.) . .)

Cocoanut Oil Company through your firm in the four actions mentioned in this complaint involved here?

A. I will answer that question by saying that they were the basis of Mr. Porter's two complaints against us; each one of the five contracts between Porter and the Java Company was involved in the two suits in which your company and Mr. Redman's company gave the bonds; and obviously we had to file counterclaims and cross-complaints in those suits because Porter had taken the cake under those contracts and had not paid for it, and we were permitted, as you know, under the Code, to file these counterclaims, because they arose out of the same transaction.

Q. But, as a matter of fact, Mr. Clements, the president of the Java Cocoanut Oil Company, when he consulted with you in August of 1920, did so after Mr. Porter had repudiated the five contracts with the Java Cocoanut Oil Company?

A. No, not in their entirety. You understand, these contracts—these contracts provided for successive deliveries, running over a long period of time and each delivery was tendered Porter as it came into port, and as each delivery was tendered to him after Mr. Clements had consulted me, Mr. Porter refused to accept it, and each delivery was treated as a separate transaction, and that ran along for quite a long period of time. [54]

Now, if you Honor please, as counsel for myself I have not objected to these questions, I have

(Testimony of Alfred Sutro.)

no desire to stop the investigation, I am perfectly willing to have all of the facts come in, but I do not see the materiality of them, because the counsel have stipulated that \$15,000 in one case and \$10,000 in the other case was the reasonable value of the services that we rendered in these suits after the attachments were levied. I have testified that the amounts were paid us. That is the whole issue.

The COURT.—Counsel is entitled to some latitude on cross-examination. Proceed.

Mr. PEART.—Our position is, I think, quite clear to your Honor, from what Mr. Sutro has said, that we have denied in our answer that these amounts were paid to secure a dissolution of the attachment, and I think this line of inquiry is material.

Q. When Mr. Clements left for New York, did the Java Cocoanut Oil Company have any representative here in the city? A. Yes.

Q. What was his name?

A. David Dorward, Jr.

Q. From the time that you were first employed in the case, did you have frequent conferences with him in regard to the contracts with Porter?

A. If you will eliminate in regard to contracts with Porter, I will answer I had frequent conferences with him about the Porter matter.

Q. Did you also have many conferences with Porter or his representatives?

A. No, not many, I will tell you, Mr. Peart—

Q. (Intg.) Did you have many with his counsel?

(Testimony of Alfred Suter.)

A. No. At first we had some conferences, and I advised Mr. Clements that litigation was undesirable, it would be long and expensive, and always uncertain, and Mr. Porter and Mr. Christin—for the first time I had the pleasure of meeting Mr. Christin—met Mr. Clements and me, and it was my understanding that we had come to a definite agreement, and I was very greatly surprised that the agreement—I do not like to use the word—was repudiated, and after that there still were spasmodic attempts, as I will recall, to compromise, until [55] Porter attached in the action 16,430, and in view of his attitude in having repudiated these contracts on a steadily following market, all thought of compromise was thereafter abandoned.

Q. Mr. Christin was acting as attorney?

A. Yes. You are asking me when I had the interviews, and I explain to you.

Q. Was Mr. Porter represented by anyone other than Mr. Christin?

A. The firm of Knight, Boland, Hutchinson & Christin represented him, and of that firm there were several besides Mr. Christin who were here at the trial, and Mr. Partridge, now Judge Partridge, represented Mr. Porter, and Mr. Partridge took the laboring oar during the trial, which lasted some three weeks, and which some eighty odd witnesses, as I recall, were examined—no, I think 71, to be accurate, 23 on behalf of the plaintiff Porter, and 48 on behalf of the Java Coconut Oil Company, involving scientists, university professors

(Testimony of Alfred Sutro.)

from Stanford and Berkeley, and so on, a jury trial.

Q. Was Judge Partridge present at the conference held before litigation commenced?

A. He was then Mr. Partridge. He had not risen to his present dignity. No, I do not recall that he was present at any conference. I think that by reason of the fact that he and I were old friends, and of very long and old standing, that I saw him personally after the agreement which I conceived had been reached had been repudiated—I saw him in an effort to bring the parties together; in fact, I would say definitely that I called on him at his office on Post Street, and then to finish up his connection so far as these compromise negotiations were concerned, I think he wrote me a letter in the form of an ultimatum, which we received and we let the ultimatum pass.

Q. Very earnest and repeated efforts were made, were there not, on behalf of yourself and counsel on the other side, to settle all differences between the Java Cocoanut Oil Company and Porter before litigation actually commenced?

A. Your question is compound; so far as the repeated part of it is concerned, that is not the fact; very earnest efforts were made, I put my heart and soul into it, and I thought we had agreed upon a compromise, as I told you, and that [56] was at a conference which consumed the greater part of an afternoon, between Mr. Christin, Mr. Porter, Mr. Clements and myself, as I have narrated to you, and that, so far as I recall, was the

(Testimony of Alfred Sutro.)

only effort that was made—real long conference and earnest effort.

Q. Mr. Sutro, when was that time, if you can recall, when negotiations had apparently or did terminate and the ultimatum was given?

A. They terminated when Mr. Porter filed his first suit; but I will say I had not given up an idea that things might not be arranged, because I did not believe in litigation if it could be avoided, and we ran along until the attachment by Porter. As I stated to you, that seemed to add insult to injury; he tied up a lot of property and cake of the company here, and the company had to pay a very heavy premium to get the stuff released, stuff that it had sold Porter, and which he would not take, and which it then had to sell on a falling market. I might say for your information that the amount of cake which Porter had contracted for was probably up to nearly a million dollars, and when he first took it the market was going up, and that the quantity of it would probably take up perhaps a square block of room piled 20 or 30 feet high. This copra cake, your Honor, is very bulky, and the company had to get rid of it, and when Porter attached that cake, it made it more difficult, we had to give bond, which seemed unnecessary expense, to rid it from the attachment, so that we could sell it; the meal was tied up over at the Frenzel-Payne Mill, which had been ground from the cake, and which had been sold, and which the company was attempting to sell and was selling to farmers here and in the North-

(Testimony of Alfred Sutray)

ern part of the state, and that attachment of course, stopped everything. From then on it was a question of fight, a fight to the finish, with the result that you know.

Q. While these negotiations were in progress, were you anticipating that they might fail?

A. Why, certainly. I did not know as a foregone conclusion that I was going to compromise them. I won't [57] say that I went into it anticipating that they would fail. Anything that I go into I go into with the hope of success. That is the feeling I have in this case.

Q. Finally, you were, therefore, rendering services to the Java Cocoanut Oil Company, looking to possible litigation, even before litigation commenced?

A. That is calling for a psychological condition which I could not very well answer. I knew that if a compromise were not effected and Mr. Porter were unwilling to pay in any event something for the cake that he had received, and which amounted to practically \$190,000, and which we had information that he had sold for sums in excess of \$100,000, we were going to sue him, I knew that, no mistake about that. And, further than that, I will tell you unless he were willing to make some arrangement to fill on the rest of the contracts by which he had obligated himself, taking into consideration the falling market, we would try to hold him to these contracts, as we did.

Q. And you were, therefore, preparing, as all

(Testimony of Alfred Sutro.)

attorneys do, upon the facts and the law in the event that a compromise was not reached?

A. Not very extensively at that time; in fact, you might say not at all. I was making no preparations at that time, and the facts were developed *in extenso* after the end of the year 1920. I engaged two professors of the University of Stanford to conduct an experiment with a herd of 20 or 30 cows of the finest variety, lasting over a long period of months, because I wanted to know the truth. Mr. Porter claimed that this cake was infested with bugs, and that it was not merchantable; we showed that the cake which he had received before he made this contract, when the market was rising, was the same kind of cake—we had a chart here showing the shipments he had received, and on these contracts he made money—and I wanted to find out—he claimed that the cake would be bad if it were ground up into meal to feed to cattle, and I wanted to find out whether or not it would be and I employed these professors, and I employed an expert cattle man to make these experiments, and we went into this thing from the bottom up, from the ground up; we employed other experts to investigate these [58] matters. That was after your attachments were levied.

Q. After yours were levied as well? That is, by our attachments, you refer to the attachments levied by Porter?

A. Yes; certainly, they were after ours. I do not deny that; if you are asking me that question I will

(Testimony of Alfred Sutro.)

say 'certainly'; there is no evidence in connection with this whole business that I am not perfectly ready to tell you if you want it.

Q. I know that. I want to get it before his Honor. A. So far as they are material.

Q. If I gather your testimony correctly, this copra cake of the contract price of about \$190,000—

A. (Intg.) That is in round figures.

Q. (Continuing.) —in round figures, had been delivered to Mr. Porter, and was not paid for by Porter to the Java Coconut Oil Company prior to the institution of any litigation? A. Yes.

Q. And, thereafter, succeeding shipments were arriving? A. Regularly.

Q. At what intervals, approximately?

A. Monthly.

Q. When did they terminate, approximately?

A. In January, 1921.

Q. As those shipments came in, did you take any precautions toward ascertaining their condition and quality with reference to the contracts?

A. How is that?

Q. As the shipments arrived, did you make an examination in any way in reference to the quality?

A. Yes—not any intensive examination, because I will tell you, this copra remained here unaccepted by Porter; there was such a slump in the market that we could not sell it, and I realized that we could get an examination of it at any time, practically, if it became necessary. Some of it was milled—in fact, I will tell you, for your further informa-

(**Testimony of Alfred Sutro.**)

tion, for, of course, the purpose of your question is obvious, that there was an amount of that stuff in the warehouse down here that Porter had contracted to take, and which he did not take, which the jury and his Honor, Judge Dooling, inspected during the course of the trial of which you are speaking; that was in December, [59] 1921; and that was cake out of a number of different ships; this copra came on different ships, it came on the 'Batoe,' the 'Bengkalis,' the 'Arakan,' the 'Tjison-dari,' the 'Bali,' the 'Tjikembang,' the 'Krakatau,' the 'Bondowoso,' and the 'Tjitaroem,' and on several of them on succeeding voyages; in other words, they would make this port from Java, and then they would go back to Java and come back with another cargo to this port; I think I have given you all of them.

Q. How many attachments did the Java Coconut Oil Company levy on Porter?

A. I do not remember, quite a few. If you want to know exactly, I will find that out for you, I do not want to avoid the question. There were attachments levied whenever we could find that there was anything we could attach. Might I ask Mr. Prince how many there were?

Mr. PRINCE.—My memory is there were four.

A. Now you have your exact number.

Mr. PEART.—Q. And in, I think, three of the cases, if I recall the record, three of the cases mentioned in the complaint here, you filed counter-claims and cross-complaints?

(Testimony of Alfred Sutro.)

A. No, I think you are mistaken about that. I think Mr. Porter began two and we began two. You know since that time there has been some water gone over the dam, and I cannot remember the details without reference to the record, but I will be glad to find out anything that you want. I think Porter began two suits, and we began two suits, and in the two suits that Porter began we filed counterclaims and cross-complaints.

Q. The record, of course, would show definitely in those cases?

A. We can tell in a minute; we can go in the clerk's office and find out.

Q. Are you willing to stipulate that the records in the four cases be introduced in evidence?

A. I won't stipulate. I think it will make an unnecessarily long record.

Q. What were the aggregate amounts that the Java Coconut Oil Company sued Porter for by cross-complaint or counterclaim in [60] the four cases consolidated under No. 16,430?

A. If you put your question in that way—you ask for the aggregate amount that we sued Porter for in the cross-complaints and counterclaims?

Q. Or by direct action.

A. Our verdict was for practically \$495,000. The principal was less than that, as I recall, I think with interest it ran a little over \$500,000; the jury awarded nearly the whole amount claimed.

Q. And those were your cross-demands in the four cases?

(Testimony of Alfred Suffro.)

A. They were not limited to cross-demands. We only had cross-demands in two suits. We did not have to file cross-demands in the suits wherein we were plaintiffs.

Q. And what were the cross-demands in 16,430?

A. About \$189,000, as I told you.

Q. And the one in—

A. (Intg.) Mr. Peart, let me explain to you, so that you will have it clearly, because I think I am right in saying, I think, I know you want the facts—We could not establish our cross-complaint, the facts of our cross-complaint, which in substance were that this cake was as represented in the contract, without disputing Porter in his contention that we had breached the warranty contained in the contracts in giving him inferior cake—the same witnesses were used, all of the witnesses were used for that double purpose absolutely and necessarily.

Mr. PEART.—If your Honor please, I think I will have to move to strike out that answer as argumentative and not responsive.

A. May I say, your Honor, I would like to make that statement as a part of my answer?

The COURT.—I do not think it is necessary now.

Mr. PEART.—Q. As to the second suit, how much was the cross-demand?

A. I will have to ask Mr. Prince, he has the record there.

Mr. REDMAN.—May I make this suggestion to your Honor: I want to draw a matter to the Court's attention. It is alleged in [61] these cases that

(Testimony of Alfred Suito.)

these suits are ancillary to the consolidated action; that is how this Court acquires jurisdiction. Now, might we not have, that being the allegation that they are ancillary, the papers in the consolidated case, all of them, considered as before the Court, and that will save a lot of trouble. Then we will know by reference to the record what these amounts were, when the cross-complaints were filed, and the dates of them. May not that be considered done?

The WITNESS.—Might I state, your Honor, that the allegation with reference to the ancillary nature of these suits was made to show the jurisdiction of the court; the jurisdiction of the court is now conceded. All of the papers and the entire record in these cases to which counsel has referred would seem to me, and I respectfully submit, unnecessarily encumber the record in this case.

The COURT.—They will be before the Court, and they will not necessarily be incorporated in any record if any is made.

The WITNESS.—We have absolutely no objection to their being before the Court.

Mr. PEART.—Q. If you can tell us, what was the amount asked for in the second suit?

A. \$219,374.39.

Q. That is action 16,452? A. Yes.

Q. And in the other two cases there were no cross-demands? A. No.

Q. In the direct action which the Java Cocoanut

(Testimony of Alfred Sutro.)

Oil Company filed against Porter, what was the amount claimed?

A. Will you give them, Mr. Prince?

Mr. PRINCE.—There were two of them.

The COURT.—Tell us both; one at a time.

Mr. PRINCE.—The first one was \$22,342.50, that is action No. 16,498, and in 16,518 the prayer of the complaint is for \$65,823.68.

Mr. PEART.—Q. Those amounts claimed by the Java Cocoanut Oil Company against Porter in the four suits mentioned, two by [62] cross-complaint and counterclaim and two by direct action, represents the total demands of the Java Company against Porter under the contracts referred to, in the consolidated action, do they? A. Yes.

Q. Then, to clear the matter again in my own mind, you have testified that of that demand substantially \$190,000 had accrued and Porter had refused payment of it, before any litigation commenced? A. Yes.

Q. And as to the balance of any demand which had not accrued, by reason of the fact that delivery had not yet been made under the contract, Porter had definitely stated to the Java Cocoanut Oil Company or its officers that he repudiated the contract? A. No.

Q. I thought you so testified?

A. No. I told you that each shipment was treated separately; as each shipment came in we tendered it to Porter, and he then would either

(Testimony of Alfred Sutro.)

refuse it or repudiate it, sometimes he repudiated it and sometimes he refused.

Q. Did he not repudiate any obligation on his part of the Java Coconut Oil Company under these contracts prior to the litigation?

A. No, as I told you several times, my memory is there was only one instance in which there was a repudiation, and we were excused under the ruling of Judge Dooling, or we were upheld by his ruling in having made no tender, but as to most of the shipments and most of the obligations under each contract, we made tenders of each shipment as it arrived, and the written tenders were offered in evidence during the trial. Now, I thought I made that clear to you before.

Q. I probably misunderstood what you said. I thought you said he repudiated the contracts during the litigation?

A. No; my recollection is there was only one repudiation. Isn't that right, Mr. Prince?

Mr. PRINCE.—There was only one repudiation.

The WITNESS.—That is what I mean, there was one repudiation [63] and as to that we did not have to make a tender. That was later along in the course of the trouble.

Q. When was the attachment levied on behalf of Porter in action 16,430, do you recall?

A. I can tell you that exactly, January 30.

Mr. REDMAN.—It is in the return.

A. No, that is your return. You are speaking of our attachment?

(Testimony of Alfred Sutro.)

Mr. PEART.—No, I am speaking of the Porter attachment. I think the return shows that was December 20, it was levied upon.

A. As I recall, in the Fidelity suit you did not take out your attachment until December 26.

Q. 28th.

A. Whatever that date is; I mean it is on or about that time.

Mr. PEART.—Q. In the case against the Fidelity & Deposit Company, Mr. Sutro, do you recall when the Java Coconut Oil Company filed a bond on the release of the attachment levied by Porter?

A. I submit that question is immaterial.

The COURT.—You may answer if you can.

A. I don't recall the date; the record will show. We can find out the date if counsel wants it.

The COURT.—Is that also in the record?

Mr. REDMAN.—It is in the marshal's return.

The COURT.—I have a distinct prejudice against a witness being asked to tell us something which is in a record. You may refer to the record.

A. You are now asking me about 16,430?

Mr. PEART.—Yes.

A. I do not understand that they are testing my memory. They want to get the fact.

Q. There is nothing in the record to show, except the Marshal's return, that the bond was filed. I would like to get at that in some preliminary way. I will ask you, Mr. Sutro, if this is the bond filed with the Marshal to release the attachment in action 16,430?

(Testimony of Alfred Sutro.)

A. This appears to be the bond. [64]

Q. The chief deputy marshal just handed it to me.

A. It appears to have been filed, executed anyhow, on December 24, 1920; I imagine it was filed that same day, because I would know we were getting it filed as quickly as we could.

Mr. PEART.—If your Honor please, this is an original record of the Marshal's office, and I would like to read it in evidence.

Mr. SUTRO.—Of course, our objection to that is that it does not make any difference whether we filed a release bond or not; it is perfectly useless evidence, your Honor. The object of that, may I state to the Court briefly, is to support the contention that by having filed this release bond we rid ourselves of this attachment. I understand that is the theory.

The COURT.—They will be allowed to introduce it in evidence. If not material or competent, it will be rejected in making up a decision.

Mr. SUTRO.—Exception."

To the ruling of the Court in admitting said bond in evidence, the plaintiff thus then and there duly excepted, and said exception is hereby designated as

EXCEPTION No. 1.

"Mr. PEART.—Shall I read it, or the reporter?

The COURT.—It may be copied into the record. It is just the release bond we want copied.

(Testimony of Alfred Sutro.)

The WITNESS.—You had better leave that with the reporter, and he can copy it into the record.

Mr. PEART.—Very well.”

The bond in question reads as follows: [65]

“AMERICAN SURETY COMPANY
of New York.

Capital \$5,000,000.

In the District Court of the United States for the
Northern District of California, Second Division.

No. 16,430.

WARREN K. PORTER, Doing Business Under the
Name and Style of PORTER TRADING
COMPANY,

Plaintiff,

vs.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation, and OLIEFABRIEKEN INSULINDE, N. V., a Corporation,

Defendant.

UNDERTAKING ON RELEASE OF ATTACHMENT.

WHEREAS, the above-named plaintiff has commenced an action in the District Court of the United States for the Northern District of California, Second Division, against the defendants claiming that there is due to said plaintiff from defendants the sum of One Hundred Forty-three

Thousand Five Hundred Sixty-six & 25/100 (\$143,566.25) Dollars, besides interest; and thereupon an attachment issued against the property of the defendants as security for the satisfaction of any judgment that might be recovered therein; and certain property and effects of the defendant, Java Cocoanut Oil Company, Ltd., has been attached and seized by the Marshal of said district, under said writ;

And WHEREOF, the said defendant, Java Cocoanut Oil Company, Ltd., is desirous of having said property released from said attachment.

NOW THEREFORE, the undersigned, American Surety Company of New York, a corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact business in the State of California, in consideration of the premises, and also in consideration of the release from said attachment of all property attached, as above mentioned and the discharge of said attachment, does hereby undertake in the sum of Seventy-two Thousand One Hundred Sixty-six & 25/100 Dollars (\$72,166.25), and promise that in case the plaintiff recovers judgment in said action, the defendant, Java Cocoanut Oil Company, Ltd., will, on demand, redeliver the attached property so released to the proper officer to be applied to the payment of the judgment, or in default thereof, that the defendant, Java Cocoanut Oil Company, Ltd., and surety will, on demand, pay to the plaintiff the full value of the property released, not exceeding the amount of such judgment.

(Testimony of Alfred Sutro.)

IN WITNESS WHEREOF, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 24th day of December, A. D. 1920.

AMERICAN SURETY COMPANY OF
NEW YORK.

By D. ELMER DYER,
Resident Vice-president. [66]
Attest: E. C. MILLER,
Resident Assistant Secretary."

Mr. PEART. (Continuing).—"Q. I will ask you, Mr. Sutro, if this is the bond on release of attachment which was filed with the Marshal by you in the other action, No. 16,452?

A. That appears to be the bond that was filed. Yes, I recognize my handwriting on that, 27,500. That was executed December 30, 1920, and I assume filed at the same time. We have the same objection and exception, your Honor?

The COURT.—The same ruling and exception."

Plaintiff having thus then and there duly except to the ruling of the Court in admitting in evidence said bond filed in action No. 16,452, hereby designates said exception as

EXCEPTION No. 2.

"Mr. PEART.—In like manner, we would like to ask that it be stipulated that this be copied.

The COURT.—It may be."

The bond in question reads as follows:

“In the District Court of the United States for the Northern District of California, Second Division.

No. 16,452.

WARREN R. PORTER, Doing Business as
PORTER TRADING COMPANY,
Plaintiff,

vs.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation, and OILEFABRIKEN INSULINDE, N. V., a Corporation,
Defendants.

UNDERTAKING ON RELEASE OF ATTACHMENT.

WHEREAS, the above-named plaintiff has commenced an action in the District Court of the United States, for the Northern District of California, Second Division, against the defendants claiming that there is due to said plaintiff from defendants the sum of Twenty-seven thousand five hundred dollars (\$27,500); and thereupon an attachment issued against the property of the defendants as security for the satisfaction of any judgment that might be recovered therein; and certain property and effects of the defendant, Java Coconut Oil Company, Ltd., has been attached and seized by the Marshal of said District, under said writ; [67]

AND WHEREAS, the said defendant, Java Coconut Oil Company, Ltd., is desirous of having said property released from said attachment.

NOW, THEREFORE, the undersigned, American Surety Company of New York, a corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact business in the State of California, in consideration of the premises, and also in consideration of the release from said attachment of all property attached, as above mentioned and the discharge of said attachment, does hereby undertake in the sum of Twenty-seven Thousand Five Hundred (\$27,500.00) Dollars, and promises that in case the plaintiff recovers judgment in said action, the defendant, Java Cocoanut Oil Company, Ltd., will, on demand, redeliver the attached property so released to the proper officer to be applied to the payment of the judgment, or in default thereof, that the defendant, Java Cocoanut Oil Company, Ltd., and surety will, on demand, pay to the plaintiff the full value of the property released, not exceeding the amount of such judgment.

IN WITNESS WHEREOF, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 30th day of December, A. D. 1920.

AMERICAN SURETY COMPANY OF
NEW YORK.

By R. D. WELDON,
Resident Vice-president.
Attest: E. C. MILLER,

Resident Assistant Secretary."

"Mr. PEART.—Q. Did Mr. Sutro, did you have a written contract with the Java Cocoanut Oil Company for your services in these matters with Porter?

(Testimony of Alfred Sutro.)

A. No.

Q. What conversations, if any, did you have with any representative of the Java Cocoanut Oil Company in regard to compensation?

A. Well, that is a very difficult question to answer. I had a number of talks with Mr. Clements, I might say, before he left San Francisco; on September 11, 1920 he paid my firm as a retainer on this transaction \$5000, and Mr. Clements told me as a part of the conversations relative to the whole litigation after the verdict was rendered, that if we could collect that judgment, in view of the year's work or more than a year's work which had been done, and having a judgment for practically \$500,000, that they would be perfectly willing to pay us \$100,000 if we collected it. [68]

Q. How did it come about that on December 10, 1921, you were paid \$10,000? Did you render a statement? A. On December 10?

Q. Yes.

A. That was immediately after the verdict—no, there was no statement rendered. Mr. Clements said that the tremendous work that had been done, he thought deserved recognition promptly, whether or not anything was collected from Porter. That was immediately after the judgment. The judgment was rendered on December 8.

Q. The next payment that was made to you was January 16, 1922?

A. Yes. We collected some money which was in the hands of the Marshal, a good deal more than

(Testimony of Alfred Sutro.)

that, and Mr. Clements was in New York, had gone back, and wired us, as I recall, to retain, or had told me before he left here we should retain for our services out of that sum \$15,000.

Q. Were you paid a further sum after that for this litigation? A. Yes.

Q. What amount?

A. There were further sums paid at later times. There was nothing more paid in 1921. So far as any further sums are concerned, while I have no objection, if your Honor rules I should testify as to it I do want to make an objection that it is not material. We have shown that they have paid us at least the amount we are suing for, and it is stipulated that the reasonable value of the services that we rendered in this case was \$15,000, and the other \$10,000—does your Honor direct me to testify?

The COURT.—Are you basing your right to recover on what was paid in that action as distinguished between your services, as you claim, in your release of attachment and the defense of the action and the establishment of your own cause of action?

A. I will answer your Honor by saying I want your Honor to understand, and counsel to understand, there never was, so far as Mr. Clements, or the plaintiff in this case, is concerned, any distinct allocation to these actions of any specific amount of money. I [69] do not wish to appear here as conveying that impression. That is a fact. In bringing this suit, we have allocated to these two suits, out of the total amount paid us, these two

(Testimony of Alfred Sutro.)

sums, and counsel have stipulated that they are reasonable sums for the services that we have alleged. I do not want the Court or counsel to think that I am saying that there was any specific allocation. There was not.

The COURT.—I think the question is proper for this reason, suppose it should appear that this was all you had gotten for your services. I think you ought to answer.

A. We were paid on January 16, 1922, the further sum of — that I gave you — February 27, 1922, \$6000; April 15, 1922, \$5000; October 30, 1922, \$5000. And Mr. Clements told me he was sorry that conditions did not warrant a much larger recognition of all the work that had been done. I want to also say these services were not exclusively for this litigation. In the disposition of that meal—I am making this statement, because I want the facts to be absolutely clear before the Court and counsel. Forms had to be prepared for the sale of the meal that was ground. Further, this cake—Mr. Clements also had sold the cake to the Albers Brothers Milling Company out of the same shipments that were intended for Porter, and out of which Porter was tendered delivery; arrangements had to be made for the taking of this cake by Albers Bros.; Albers Bros. took out of every shipment the cake which they had contracted to take, and it was the same shipment that was tendered to Porter. There were also parts of this cake sold to Edward L. Eyre Co.; contracts had to be prepared; Beanston, who had a mill—I forget

(Testimony of Alfred Sutro.)

exactly the name of it—the Occidental Mill, I think it was, I am not sure of that, had contracted to grind certain of this cake; certain dealings were had with him. The International Milling Company was a concern that Porter had with some associates, one of whom was Mr. Christin sitting there; they had formed this concern, and they were going to grind this [70] cake; they had leased some property on which they put a mill, and when market conditions looked very flourishing, this thing was in its incipency, and they were going to grind this cake; some of the cake which Porter accepted, and which he had not paid for, had been taken over to this mill, and there were certain complications that had arisen out of that, and services were rendered in connection with that. But all of these services, I might say, we considered as thrown in with the main litigation here. That isn't all. There were some other things, for instance Porter had joined the Oliefabrieken Insulinde, which was the concern that produced this copra cake in Java, as defendant in this action; the Oliefabrieken, from our viewpoint, as we were upheld by the court here, had nothing whatever to do with these contracts, and it had never been in business in California, and it was very undesirable, of course, to have it as a defendant here; it would have been subject to penalties on behalf of the State if it had transacted business here, and we had to make motions to get it out of the litigation. These motions prevailed. Then there were one or two questions of taxation concerning which Mr.

(Testimony of Alfred Sutro.)

Clements interrogated me, and license taxes to be paid by the Java Cocoanut Oil Company, questions of taxation with reference to the site that it has over at the Western Pacific Mole, where the cocoanut oil is received in large tanks, and matters of that sort; but, as I say, we considered, in view of the disaster which had befallen the company by reason of Porter's action, that we would not make any specific charges for those services, but it was all included in the total amount paid us of \$50,000.

Mr. PEART.—I only have \$45,000.

A. I don't know if I told you that Mr. Clements paid us a retainer of \$5,000 on September 11, 1920.

The COURT.—Yes. The witness testified to a \$5,000 retainer sometime in September, I think.

A. September 11, 1920.

Mr. PEART.—Q. Now, Mr. Sutro, if I understand your testimony, three payments of \$6,000, \$5,000, and \$5,000 paid in [71] February, April and October, 1922, were referable to services rendered in all of the matters you have just enumerated and in some part to the litigation in question?

A. No. I told you that this \$6,000 was paid February 27th; get this right, now. \$5,000 April 15, \$5,000 October 30, and that no charge was made for the various matters that I have mentioned outside of this litigation. But I mentioned them to you, because services were rendered to the concern, and Mr. Clements paid us \$50,000 for services in this litigation as such, and the other matters we allowed to go by default, if you please, we did not make a

(Testimony of Alfred Sutro.)

charge for them. We considered the \$50,000 as payment for the services in litigation between Porter and the Java Cocomanut Oil Company, and no charges were set up on our books for any other services.

Q. Did you bill them?

A. We did not bill them.

Q. But in your books you charged it to this litigation?

A. This litigation; it is credited to the Java Cocomanut Oil Company, and no charges were set up for services outside of this litigation. I simply mention this to you so that you will be set entirely right as to what transpired between that concern and ourselves. I may further say to you, I don't know whether you got it, that Mr. Clements told me if we could collect that judgment he would be very glad to pay us \$100,000, because he had never seen better, more efficient or extensive work done.

Q. In the procuring of the judgment?

A. In the securing of the judgment. It might interest you also to know that the scientific investigation that the two professors made in this case was the subject of a paper that Professor Doan read at a meeting of scientists in Cambridge, Mass., last fall.

Q. How often did you consult with these professors during the trial?

A. A great many times after the beginning of July.

Q. Their investigation extended over what period of time, as to the quality of cake?

A. My recollection—and, of course, I am [72]

(Testimony of Alfred Sutro.)

just giving you the best of my recollection, I may be mistaken about this, but it extended, as I recall, from the beginning of the year 1921 to the end of the time when they testified here.

Q. 1921?

A. 1921. It took some time to formulate the scheme that we had in mind, to get at the truth of this thing and find out if this meal, ground from that cake which was infested with bugs, such as all of that cake was shown to the jury is infested that comes from Java to this country, would be injurious to cattle, we got the Palo Alto Stock Dairy to permit us to make the experiment, and I think there were 20 Holstein cows, the very finest we could find, on which we experimented.

Q. Were there many preliminary motions, or arguments of a legal nature in the four actions?

A. Some of them; we had very many after 1921; there might have been some before, but the heavy work was done after the beginning of 1921; and you can take it from me that the preparation of the counterclaims and cross-complaints, in view of the many contracts and the many shipments that had been made, was a task, to use one of your words, it was colossal in its nature; I spent many Sundays and holidays on it with Mr. Prince.

Q. If I understood your statement to the Court a little while ago, Mr. Sutro, you never made any allocation of any particular charge against any particular service rendered by your firm to the Java Coconut Oil Company in this litigation?

[Testimony of Alfred Sutro.)]

A. No, we did not.

Mr. PEART.—That is all.

The WITNESS.—Now, your Honor, I would like to state on redirect examination, in view of the cross-examination, that the defense of the suit that was brought by Porter, the two suits that were brought by Porter, involved practically absolutely, I am using the word advisedly, the same work that we did in prosecuting the counter-claims and cross-complaints which we filed in these suits, and the complaints which were filed in the other two suits that were brought against Porter; that there were many witnesses whom we interviewed, and while we only had 48 testify, we had a good [73] many more in reserve. There was not one, that I recall, who was limited to any particular matter as to any one suit; in fact, at the very beginning of the trial Judge Dooling ruled that he would consider that we should treat the cake in all of these shipments as the same kind of cake, and that there was one question before the jury, and that was as to the quality of the cake involved in all of these shipments; and that in order to defeat Porter in his two suits, we necessarily had to offer facts which, if the jury believed them, as they did, as we proved to them, entitled us to prevail in all of the suits.

The COURT.—Any further questions?

Mr. PEART.—Q. Of course, these same facts, as you have stated, had to be prepared, and the authorities had to be prepared, in order to establish your case against Porter?

A. I have so stated.

Mr. PEART.—That is all.

Mr. SUTRO.—That is our case.

The COURT.—The defense may proceed.”

“Mr. PEART.—If your Honor please, we would like to ask the Clerk to produce the records in this case, and would like to offer the judgment-roll in the consolidated action No. 16,430.

The COURT.—It may be considered in evidence for such uses as it may serve; if this case should go any further I see no necessity for printing it, unless you take it up as an exhibit to the other court.

Mr. PEART.—We will offer all of the papers, for a similar reason, in all four of the actions mentioned, No. 16,430, No. 16,452, 16,498, and 16,518.

Mr. SUTRO.—If your Honor please, we object to all of these offers on the ground that it is immaterial matter and [74] incompetent and irrelevant. The only purpose would be in connection with the ancillary nature of this action. The return on the writs of attachment shows, as I say, that is simply put in to show the court’s jurisdiction. That is admitted now. If we should be under the necessity of taking this case to an Appellate Court and have to put into the record all of that matter, it would be a severe hardship, I submit, to your Honor.

The COURT.—You come in and testify that you allocated none of your charges, and they want to show the exact amount of labor that you gave to the merits of the suit. There must be some way of arriving at what you are entitled to for a dissolution

of this attachment, if you are entitled to anything. The objection will be overruled. The papers will be admitted for the personal inspection of the Court, but not to be incorporated in the record."

To the foregoing ruling of the Court the plaintiff then and there duly excepted and said exception is hereby designated as

EXCEPTION No. 3.

"Mr. PEART.—In like manner, we would like to offer the minutes of the Court, and the docket in each of the cases, for the same purpose.

The COURT.—What do you mean, as to these particular cases?

Mr. PEART.—Yes, as to these particular cases. Mr. Sutro has testified to these matters, and here is the documentary evidence, and the minutes of the Court, and of course, they are the very best evidence.

The COURT.—For the same limited purpose that the Court has stated in connection with the offer of the files, the judgment-roll, [75] the minutes of the Court in reference to these cases, and the documents will be subject to the inspection of the Court for whatever value they may have, but not to be incorporated in any record.

Mr. SUTRO.—Might I say to your Honor at this point, which your Honor stated, about the allocation of the fees, just to call your Honor's attention, in connection with our objection, to the stipulation that they have made, that \$15,000 in one case and \$10,000 in another case were reasonable charges.

The COURT.—For the whole case?

Mr. SUTRO.—No, that is just the point that I want to bring to your Honor's mind. 'It is stipulated that the sum of \$10,000 is the reasonable value of the services rendered subsequent to the 27th day of December, 1920, by Messrs, Pillsbury, Madison & Sutro, as attorneys for plaintiff in defending the original action No. 16,452,' and the stipulation is the same in the other case. In other words, that that is the reasonable charge after attachment was levied in each case. Now, it narrows itself down to the one point, are we entitled to that fee paid for these services for defending this suit and ridding the plaintiff of the attachment in each case.

The COURT.—That is a question of law. Their theory is a little different. Their theory is there must be a segregation of services performed in the dissolution of the attachment from the services performed in defending the case on the merits. They have a right to produce their testimony in support of that theory.

Mr. SUTRO.—I want to bring clearly to your Honor's mind that the stipulation is that these are reasonable amounts for the services after the attachment.

The COURT.—I understand." [76]

Said judgment-roll in said consolidated action number 16,430 and said all the papers in said actions numbers 16,430, 16,452, 16,498 and 16,518, in addition to certain matters already set out in this bill of exceptions, show the following facts:

The original action number 16,430 was commenced by said Warren R. Porter on or about

August 28, 1920, for the recovery of \$143,566.25, with interest and costs, from Java Cocoanut Oil Company, Ltd., the plaintiff in the case at bar. On or about September 10, 1920, Java Cocoanut Oil Company, Ltd., filed an answer to said complaint, together with a counterclaim and cross-complaint praying the recovery from Porter of \$189,431.93 damages, with interest and costs. On or about September 13, 1920, said Java Cocoanut Oil Company, Ltd., on such counterclaim and cross-complaint caused and procured a writ of attachment to issue out of and over the seal of the above-entitled court, and to be levied upon the property of said Warren R. Porter. On or about December 6, 1920, said Warren R. Porter procured the writ of attachment mentioned in the amended complaint in action number 16,715, one of the cases at bar, to issue out of and over the seal of the above-entitled court against the property of plaintiff, and to be levied upon certain property of plaintiff, on or about December 20, 1920, as appears from the return of the United States marshal, hereinbefore set forth as Plaintiff's Exhibit 1. The attachment bond sued on in said action number 16,715 was given in connection with this attachment. Thereafter and on or about December 24, 1920, said Java Cocoanut Oil Company, Ltd., posted with the United States marshal the undertaking hereinabove set out at length, and said marshal thereupon released from said attachment all the property levied upon, as likewise appears from said Plaintiff's Exhibit 1. Subsequently and on or about July 12, 1921, said [77] Warren R.

Porter filed an amended complaint in said original action number 16,430 setting forth three causes of action against said Java Cocoanut Oil Company, Ltd., alleging a total damage of \$172,166.25.

Action number 16,452 was commenced by said Warren R. Porter against said Java Cocoanut Oil Company, Ltd., on or about October 1, 1920, to recover \$27,500 damages, with interest and costs. Porter claimed an additional \$100,000 by an amended cross-complaint and counterclaim filed on or about July 12, 1921. On December 27, 1920, or thereabouts, said Warren R. Porter caused the writ of attachment mentioned in the amended complaint in said action number 16,716, the other of the cases at bar, to issue out of and over the seal of the above-entitled court against the property of Java Cocoanut Oil Company, Ltd., and to be levied upon such property as is shown by the return of the United States marshal, hereinbefore set out as Plaintiff's Exhibit 2. The attachment bond sued on in said action number 16,716 was given in connection with this attachment. On December 30, 1920, or thereabouts, said Java Cocoanut Oil Company, Ltd., Posted with the United States marshal the undertaking hereinabove set forth at length, and said marshal thereupon released from said attachment all the property levied upon, as likewise appears from said Plaintiff's Exhibit 2.

On or about January 19, 1921, said Java Cocoanut Oil Company, Ltd., in said action number 16,452, filed a cross-complaint and counterclaim, by such cross-complaint and counterclaim praying the re-

covery from said Warren R. Porter of \$219,374.39 damages, with interest and costs. On or about January 31, 1921, said Java Cocoanut Oil Company, Ltd., in said action number 16,452, caused a certain writ of attachment to issue out of and over the seal of the above-entitled court against the property of said Warren R. Porter. Said writ was levied on certain property of said [78] Warren R. Porter on or about February 2, 1921. On or about June 4, 1921, upon motion of said Warren R. Porter, said writ of attachment was duly quashed, vacated and set aside. On or about March 1, 1921, said Java Cocoanut Oil Company, Ltd., caused an *alias* writ of attachment to issue in said action number 16,452, out of and over the seal of said court, and to be levied on March 2, 1921, or thereabouts, on certain property of said Warren R. Porter.

Action number 16,498 was commenced by Java Cocoanut Oil Company, Ltd., against said Warren R. Porter on or about January 19, 1921, to recover \$22,342.50, with interest and costs. Action number 16,518 was commenced by said Java Cocoanut Oil Company, Ltd., against said Warren R. Porter on or about February 23, 1921. An amended complaint praying the recovery of \$65,826.68, with interest and costs, was filed on or about October 26, 1921. In both these last mentioned actions Porter filed cross-complaints and amended cross-complaints praying in each case the sum of \$100,000 damages with interest and costs. In action number 16,498 Java Cocoanut Oil Company, Ltd., on or about January 31, 1921, caused the issuance of a

writ of attachment out of and over the seal of the above-entitled court, which writ was levied upon certain property of said Warren R. Porter on or about February 2, 1921.

Following the introduction in evidence of the judgment-roll in the consolidated action number 16,430 and all of the papers in actions numbers 16,430, 16,452, 16,498 and 16,518, said judgment-roll and said papers showing the facts stated, the following proceedings occurred: [79]

“The COURT.—Has the defense any further testimony?

Mr. REDMAN.—I think the bond in releasing the attachment is in evidence, is it not?

The COURT.—Yes.

Mr. REDMAN.—I think that is all. I think it is simply a question of law.

Mr. PEART.—Before the case is closed, in each of the cases I will make this motion, first, in case 16,430, we request the Court to render a judgment in favor of the plaintiff for a sum not exceeding the costs incurred in action 16,430 referred to in the amended complaint herein, to wit, the sum of \$1,591.64. If your Honor should deny that, we take an exception; we request your Honor to render judgment in favor of the plaintiff for a sum not exceeding said sum of \$1,591.64, plus such sum, if any, paid or incurred by the plaintiff for services rendered by its attorneys in said action No. 16,430 from the time that the attachment was levied in said action, to wit, on or about December 20, 1920, until the same was released by the giving of

a release of attachment undertaking issued in said action, including any services rendered in the procuring of said release of attachment undertaking; and should your Honor deny that, we ask for an exception. And, finally, we request your Honor, should your Honor deny that request, that you render judgment in favor of the plaintiff for a sum not exceeding the amount of the costs, plus such sum, if any, in each action paid or incurred by the plaintiff for services rendered by its attorneys from the time the attachment was levied, which in case 16,430 was December 20, 1920, and in case 16,452 was December 27, 1920, until the attachments were released by the giving of a release of attachment undertaking, [80] which in case 16,430 was December 24, or four days later, and in case 16,452 was December 30, three days later, including any service rendered in the procuring of the release of attachment undertaking. Should your Honor deny this, we most respectfully ask an exception, and request your Honor to disallow as damages recoverable by plaintiff in either action the value of any services rendered by plaintiff's attorneys in either of the actions, 16,430 or 16,452 subsequent to the release of the attachment effected by the giving of the two release attachment undertakings. If your Honor should deny that we ask for an exception."

The foregoing constitutes all of the proceedings had and all of the testimony and evidence offered and received on the trial of said actions, and all matters proved on said trial. Thereafter, and on

the pleadings and proof, the Court found the law, in so far as it related to the plaintiff's claims for attorneys' fees, as set out in the respective second causes of action in its two amended complaints, against the plaintiff and in favor of the respective defendants, and ordered the entry of judgment in favor of plaintiff against the respective defendants only for the amounts sued for in its respective first causes of action, together with interest on the amounts therein prayed from December 8, 1921, and its costs of suit in these actions.

Now, within the time required by law, the rules of this court and stipulation of the parties, said plaintiff proposes the foregoing as and for its bill of exceptions to the rulings of the Court made during the trial of said actions and the decision [81] of said court, and prays that it may be settled and allowed as correct.

Dated: San Francisco, September 13, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff. [82]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Defendant.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corporation,
Defendant.

Stipulation to Foregoing as the Bill of Exceptions in Both the Above-entitled Actions and to the Correctness of the Same.

It is hereby stipulated that, subject to the hereinafter mentioned objection of the defendant in each action above entitled, the attached and foregoing may be and is the bill of exceptions in both the above-entitled actions and that separate bills of exceptions need not be prepared or filed therein; and that, subject to the said objection of said de-

defendants, the above [83] and foregoing constitutes a true and correct bill of exceptions in said actions (said actions having been duly consolidated for trial), and contains all of the proceedings had and all of the evidence offered and received on the trial of said actions and all of the rulings of the Court made during the trial of said actions; and that, subject to said objection, the same may be settled and allowed as the bill of exceptions in said two actions and to said rulings and to the decisions of the Court in said two actions, and each of them; the defendant in each of said actions objects to the matter contained in said bill of exceptions between line 7, page 54, to and including line 11, page 55 thereof, and asks that the same be stricken out, said objection having been proposed by said defendants as an amendment to said bill of exceptions within the time and in the manner required by law.

Dated: September 27, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

REDMAN & ALEXANDER,

Attorneys for Defendant Fidelity and Deposit Company of Maryland.

HARTLEY F. PEART,

Attorney for Defendant Globe Indemnity Company.

The objection aforesaid of defendants is sustained, and the subject matter thereof stricken from the bill, in that it is superfluous.

BOURQUIN, J. [84]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Defendant.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corporation,
Defendant.

Order Settling, Certifying and Allowing Bill of Exceptions.

The attached and foregoing bill of exceptions now being presented in due time and found to be correct, I do hereby certify that the said bill is a true bill of exceptions, and contains all of the proceedings had and all of the evidence offered and received on the trial of the above-entitled actions (said actions having been duly consolidated for trial) and all of the rulings [85] of the Court

made during said trial and all of the exceptions of the respective parties thereto, and said bill of exceptions is accordingly hereby settled, certified and allowed.

Dated: October 1, 1923.

(Sgd.) BOURQUIN,
United States District Judge.

Receipt of copy of the within proposed bill of exceptions is hereby admitted this 14th day of Sept./23.

HARTLEY F. PEART,
Attorney for Globe Indemnity Co.
REDMAN & ALEXANDER.

[Endorsed]: Filed Oct. 4, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[86]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Corporation,

Defendant.

Petition for Writ of Error.

Java Cocoanut Oil Company, Ltd., a corporation, the plaintiff above named respectfully shows:

That under date of April 28, 1923, there was entered in the above-entitled court and cause a judgment in favor of said plaintiff and against the above-named defendant, said judgment being, however, only in the amount of \$1591.64, with legal interest from December 8, 1921, and costs of suit, and not in the amount prayed by plaintiff in the amended complaint herein; in which said judgment and the proceedings had prior thereto in this cause, certain manifest errors were committed, to the grievous prejudice of this plaintiff, all of which more fully appears from the assignment of errors filed with this petition.

WHEREFORE, plaintiff feeling aggrieved by said judgment, petitions and prays this Court for an order allowing plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the [87] laws of the United States in that behalf made and provided, for the correction of the errors so complained of; and that there may be attached to such writ of error a transcript of the record, proceedings and papers herein, duly authenticated, with said assignment of errors and a prayer for reversal, and that the same may be sent to said Circuit Court of Appeals; also that an order be made fixing the amount of the bond in this case.

Plaintiff herewith submits its assignment of errors in accordance with the rules of said Circuit Court of Appeals and the course and practice of this court.

And so your petitioner will ever pray.

Dated: San Francisco, October 11th, 1923.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[88]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Corporation,
Defendant.

Assignment of Errors and Prayer for Reversal.

Java Cocoanut Oil Company, Ltd., a corporation, plaintiff and plaintiff in error in the above-entitled cause, contends that in the record, opinion, decision and final judgment in said cause there is manifest and material error, and said plaintiff and plain-

tiff in error now makes, files and presents the following assignment of errors on which it will rely in the prosecution of its writ of error in said cause.

I.

That the above-entitled court erred in ordering, in rendering and in entering the final judgment herein dated April 28, 1923.

II.

That said court erred in not ordering, rendering and entering judgment for and in favor of the plaintiff in the sum of \$16,591.64, together with interest on the sum of \$1591.64 at the rate of seven per cent per annum from the 8th day of December, 1921, and for its costs of suit, as prayed in the amended complaint [89] herein.

III.

That the court erred in holding, adjudging and determining that said plaintiff was entitled to judgment only in the sum of \$1591.64, with local legal interest from December 8, 1921, and costs herein, and in not holding, adjudging and determining that plaintiff was entitled to judgment for attorneys' fees upon the second cause of action in the amended complaint herein.

IV.

That the said court erred in holding, adjudging and determining that said plaintiff was not entitled to recover attorneys' fees upon the second cause of action in the amended complaint herein, and in not ordering and entering judgment in plaintiff's favor for such fees.

V.

That the facts found by said court are insufficient to support the judgment herein, in so far as said judgment is that plaintiff do not have and recover attorneys' fees upon the second cause of action in the amended complaint herein.

VI.

That the said court erred in holding, adjudging and determining that the security, given the United States marshal by the plaintiff to relieve its property from the attachment in said second cause of action referred to, discharged the said attachment.

VII.

That the said court erred in holding, adjudging and determining that plaintiff, not having segregated said attorneys' fees for services due to said attachment from those due to the trial of the action in which said attachment issued, cannot recover for them. [90]

VIII.

That the said court erred in holding, adjudging and determining that attorneys' fees mentioned in the second cause of action of the amended complaint were not recoverable by plaintiff because they were not damages sustained by plaintiff by reason of said attachment.

IX.

That the said court erred in holding, adjudging and determining that services by plaintiff's attorneys to dispose of the action No. 16,430, in the amended complaint mentioned, and the merits thereof, were not "by reason" of said attachment.

X.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the bond given the United States marshal by this plaintiff to release its property from attachment in action No. 16,430, mentioned in said amended complaint.

XI

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the bond given the United States marshal by this plaintiff to release its property from attachment in action No. 16,452, mentioned in said amended complaint.

XII.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the judgment-roll and all the papers in the consolidated action No. 16,430, mentioned in said amended complaint.

WHEREFORE, plaintiff prays that said judgment be reversed, and that said court be directed to render and enter [91] judgment in favor of plaintiff in the amount prayed in the amended complaint herein.

Dated: San Francisco, October 11th, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[92]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Corporation,

Defendant.

Order Allowing Writ of Error.

On this 11th day of October, 1923, came the plaintiff herein, Java Cocoanut Oil Company, Ltd., a corporation, and filed herein and presented its petition praying for the allowance of a writ of error in the above-entitled action to the United States Circuit Court of Appeals for the Ninth Circuit; and it appearing to the Court that said petition should be granted and a transcript of the record in said action upon the judgment therein rendered, duly authenticated, together with the assignment of errors, the original writ of error and citation, should be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as prayed, in order that such proceedings may be had as may be just to correct any errors:

NOW, THEREFORE, it is hereby ordered that a writ of error be and the same is hereby allowed

herein as aforesaid, and that the said writ of error issue out of and over the seal of the above-entitled court; that the amount of bond on [93] said writ of error be and the same is hereby fixed at \$500; that a true copy of the record, opinion of the Court, bill of exceptions, assignment of errors, and all proceedings and papers upon which the judgment herein was rendered, together with the prayer for reversal, original writ of error and citation, all duly authenticated according to law, shall be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in order that said Court may inspect the same and take such action thereon as it may deem proper according to law and justice.

Dated: San Francisco, October 11th, 1923.

(Sgd.) JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[94]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Corporation,

Defendant.

Cost Bond in Error.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Java Cocoanut Oil Company, Ltd., a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation, as surety, are held and firmly bound unto the above-named Fidelity and Deposit Company of Maryland in the sum of Five Hundred Dollars (\$500), lawful money of the United States, to be paid to said Fidelity and Deposit Company of Maryland, for the payment of which well and truly to be made said principal and said surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Executed and dated this 11th day of October, 1923.

WHEREAS in the above-entitled court, in a suit in said court between said Java Cocoanut Oil Company, Ltd., a corporation, plaintiff, and said Fidelity and Deposit Company of Maryland, a corporation, defendant, a judgment was entered against said defendant, but only for the sum of \$1591.64, with interest from December [95] 8, 1921, and costs of suit (the same being a lesser sum than that prayed by said plaintiff), and said plaintiff having obtained, or being about to obtain, from said court a writ of error to reverse the judgment in said action and a citation to said defendant citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Cir-

cuit, to be holden at San Francisco, California, pursuant to said writ of error;

NOW THEREFORE, the condition of this obligation is such, that if said Java Cocoanut Oil Company, Ltd., a corporation, shall prosecute said writ of error to effect, and if it fails to make its plea good, shall answer all costs, then the above obligation to be void; otherwise to remain in full force and effect.

Said Hartford Accident and Indemnity Company, the surety herein, expressly agrees that in case of a breach of any condition hereof, the above-entitled court may, upon notice to it of not less than ten days, proceed summarily in the above-entitled action to ascertain the amount which such surety is bound to pay on account of such breach and render judgment therefor against said surety and award execution therefor.

IN WITNESS WHEREOF, the undersigned, Java Cocoanut Oil Company, Ltd., a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation, as surety, have caused these presents to be executed this 11th day of October, 1923.

JAVA COCOANUT OIL COMPANY, LTD.

By PILLSBURY, MADISON & SUTRO,

Its Attorneys,

Principal.

HARTFORD ACCIDENT AND INDEMNITY COMPANY.

[Seal]

By JAMES W. MOYLES,

Its Attorney in Fact,

Surety.

State of California,

City and County of San Francisco,—ss.

On the 11th day of October in the year one thousand nine hundred and twenty-three, before me, John McCallan, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared James W. Moyles, known to me to be the person whose name is subscribed to the within and annexed instrument, as the attorney in fact of the Hartford Accident and Indemnity Company, and acknowledged to me that he subscribed the name of Hartford Accident and Indemnity Company thereto as principal and his own name as the attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at my office, in the said city and county of San Francisco, the day and year first above written.

[Seal]

JOHN McCALLAN.

Notary Public, in and for the City and County of
San Francisco, State of California.

My commission will expire April 12, 1925.

The foregoing bond is hereby approved this 11th day of [96] October, 1923.

(Sgd.) JOHN S. PARTRIDGE,

District Judge.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the above-entitled Court:

Please prepare a transcript of the record for the Appellate Court in the above-entitled cause, and insert therein the following:

1. The amended complaint.
2. The demurrer to the amended complaint.
3. The order overruling the demurrer to the amended complaint.
4. The memorandum decision given by the Honorable Frank S. Dietrich, United States District Judge in ruling upon the demurrer to the amended complaint.
5. The answer to the amended complaint.
6. The stipulation in writing waiving a jury.
7. The judgment entered herein on or about the 28th day of April, 1923.

8. The opinion of the above-entitled court by the Honorable George M. Bourquin, United States District Judge, dated April 28, 1923, and the order for judgment herein. [98]
9. The bill of exceptions, the attached stipulation concerning its correctness and use, and the order settling, certifying and allowing said bill.
10. All stipulations and orders extending time for the preparation and settlement of the bill of exceptions.
11. All papers filed by the plaintiff herein in the prosecution of its writ of error, including the petition for said writ of error, the assignment of errors and prayer for reversal, the order allowing the writ of error, the original writ of error and citation on writ of error, and the bond on writ of error.
12. This praecipe.

Dated: San Francisco, October 11th, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[99]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of

California, do hereby certify the foregoing ninety-nine (99) pages, numbered from 1 to 99, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$48.80; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 29th day of October, A. D. 1923.

[Seal] WALTER B. MALING,
Clerk United States District Court, for the North-
ern District of California. [100]

In the Southern Division of the United States District Court, Northern District of California,
Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff,

VS.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Corporation,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the Honorable, the Judges of the District Court
of the United States, for the Southern Division
of the Northern District of California, GREET-
ING:

Because in the record and proceedings, and also
in the rendition of the judgment of a plea which is
in the said District Court before you, or some of you,
between Java Cocoanut Oil Company, Ltd., a cor-
poration, plaintiff, and Fidelity and Deposit Com-
pany of Maryland, a corporation, defendant, a mani-
fest error hath happened, to the great damage of
said Java Cocoanut Oil Company, Ltd., as by its
complaint appears, and it being fit and we being
willing that the error, if any there hath been, should
be duly corrected and full and speedy justice done
to the parties aforesaid in this behalf, you are
hereby commanded, if judgment be therein given,
that then, under your seal, distinctly and openly,
you send the record and proceedings aforesaid, with
all things concerning the same, to the [101]
United States Circuit Court of Appeals for the
Ninth Circuit, together with this writ, so that you
have the same at the city and county of San Fran-
cisco on the 4th day of December next, in the said
Circuit Court of Appeals, to be there and then held,
that the record and proceedings aforesaid being in-
spected, the said Circuit Court of Appeals may
cause further to be done therein to correct that

error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 11th day of October, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-eighth.

[Seal]

WALTER B. MALING,
Clerk of the United States District Court for the
Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

The above writ of error is hereby allowed.

JOHN S. PARTRIDGE,
Judge.

Receipt of copy of the within writ of error is hereby admitted this 11th day of October, 1923.

REDMAN & ALEXANDER,
Attorneys for Defendant.

[Endorsed]: No. 16,715. Southern Division U. S. District Court, Northern District of California, Second Division. Java Cocoanut Oil Company, Ltd., a Corporation, Plaintiff, vs. Fidelity and Deposit Company of Maryland, a Corporation, Defendant. Writ of Error. Filed Oct. 13, 1923. Walter B. Maling, Clerk. [102]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,
Clerk U. S. District Court, Northern District of
California. [103]

In the Southern Division of the United States District Court, Northern District of California,
Second Division.

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Corporation,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America,
To Fidelity and Deposit Company of Maryland, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city and county of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued out of and now on file in the clerk's office of the United States District Court for the Southern Division of the Northern District of California, Second Division, in the above-entitled cause, wherein Java Cocoanut Oil Company, Ltd., a corporation, is plaintiff and plaintiff in error, and you, said Fidelity and Deposit Company, of Maryland, a corporation, are defendant and defendant in error; to show cause, if any there be, [104] why the judgment in said writ of error mentioned should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JOHN S. PART-
RIDGE, United States District Judge, this 11th
day of October, 1923.

JOHN S. PARTRIDGE,
United States District Judge. [105]

Receipt of copy of the within citation on writ of error is hereby admitted this 11th day of Oct., 1923.

REDMAN & ALEXANDER,

Attorneys for Defendant.

[Endorsed]: No. 16,715. Southern Division U. S. District Court, Northern District of California, Second Division. Java Cocoanut Oil Company, Ltd., a Corporation, Plaintiff, vs. Fidelity and Deposit Company of Maryland, a Corporation, Defendant. Citation on writ of Error. Filed Oct. 13, 1923. Walter B. Maling, Clerk.

[Endorsed]: No. 4125. United States Circuit Court of Appeals for the Ninth Circuit. Java Cocoanut Oil Company, Ltd., a Corporation, Plaintiff in Error, vs. Fidelity and Deposit Company of Maryland, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed October 30, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff in Error,

vs.

GLOBE INDEMNITY COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

Names and Addresses of Attorneys of Record.

Messrs. PILLSBURY, MADISON & SUTRO,
Standard Oil Bldg., San Francisco, California,
Attorneys for Plaintiff in Error.

HARTLEY F. PEART, Esq., Humboldt Bank
Bldg., San Francisco, California,
Attorney for Defendant in Error.

In the Southern Division of the United States Dis-
trict Court, Northern District of California,
Second Division.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corpora-
tion,

Defendant.

Amended Complaint upon Attachment Bond.

Plaintiff, by leave of Court, files this its amended
complaint against defendant and for a first cause
of action alleges:

I.

That at all times herein mentioned plaintiff was
and is now a corporation; that at all of said times
defendant was and now is a corporation.

II.

That heretofore, to wit, on or about the 1st day of October, 1920, one Warren R. Porter commenced an action in the above-entitled court against plaintiff herein, to recover damages from plaintiff for alleged breaches by plaintiff of certain written contracts between plaintiff and said Warren R. Porter; that said action was numbered in said court No. 16,452; that thereafter, in said action, and on or about the 27th day of December, 1920, said Warren R. Porter procured a writ of attachment to issue out of and over the seal of said court against the property of plaintiff.

III.

That on or about the 27th day of December, 1920, and in consideration of the issuance of said writ of attachment, defendant executed a certain written bond and undertaking, a copy of which is hereto attached and marked Exhibit "A" and is hereby referred to and made a part hereof the same as if herein set forth at length. [1*]

IV.

That on or about the 21st day of November, 1921, there were pending in said court, in addition to said action No. 16,452, three certain other actions between said Warren R. Porter and this plaintiff, which said actions were numbered in said court, respectively, No. 16,430, No. 16,498 and No. 16,518; that all of said actions arose out of the same transactions as said action No. 16,452, and involved is-

*Page-number appearing at foot of page of original certified Transcript of Record.

issues substantially similar to the issues in said action No. 16,452.

V.

That on or about said 21st day of November, 1921, by an order of said Court on said day duly given or made and entered, said actions No. 16,430, No. 16,452, No. 16,498 and No. 16,518 were consolidated for all purposes; that thereafter, pursuant to said order of said Court, all of said actions were collectively entitled in said court "Warren R. Porter, doing business under the name and style of Porter Trading Company, Plaintiff, vs. Java Cocoanut Oil Co., Ltd., a corporation, Defendant," and were numbered therein No. 16,430.

VI.

That thereafter and on or about the 8th day of December, 1921, judgment was duly given or made and entered in said consolidated action No. 16,430; that said judgment was that said Warren R. Porter take nothing by said action, and that this plaintiff have and recover from said Warren R. Porter the sum of \$494,498.30 damages, and its costs of suit; that thereafter, and on or about the 23d day of December, 1921, said costs were duly taxed in favor of this plaintiff and against said Warren R. Porter in the sum of \$2,569.45.

VII.

That of said sum of \$2,569.45, the sum of \$869.19 was awarded to and taxed in favor of this plaintiff, and against said Warren N. Porter, as this plaintiff's costs in said action No. 16,452; that said sum of \$869.19 includes no items of costs in said original

action No. 16,430, or in said action No. 16,498, or in said action No. 16,518, or in any other action [2] except No. 16,452, wherein defendant executed said written bond and undertaking Exhibit "A."

VIII.

That writs of execution against the property of said Warren R. Porter have issued out of and over the seal of said Court in said consolidated action No. 16,430, and returned unsatisfied; that there is now due, owing and unpaid on said judgment from said Warren R. Porter to plaintiff herein the sum of \$441,557.40 or thereabouts, together with interest thereon at the rate of seven per cent per annum from the 10th day of March, 1922; that, although thereunto requested, defendant has not paid said sum of \$869.19, or any part thereof, to plaintiff, and the whole of said sum of \$869.19 is now due, owing and unpaid from defendant to plaintiff herein.

IX.

That all and singular the matters and things alleged in this cause of action are ancillary to said action No. 16,452, and within the jurisdiction of this Honorable Court.

And for a second cause of action plaintiff alleges:

I.

Plaintiff hereby refers to and repeats and makes a part hereof, to all intents and purposes the same as if herein set forth at length, the allegations of paragraphs, I, II, III, IV, V, VI and VIII of the first cause of action herein.

II.

That to procure the dissolution of said attachment, it was necessary for plaintiff to defend said action No. 16,452, and said consolidated action No. 16,430; that plaintiff employed for such purpose the law firm of Pillsbury, Madison & Sutro; that said firm represented plaintiff in said action No. 16,452 and in said consolidated action No. 16,430, and defended the same for plaintiff.

III.

That for the services of said firm in said action No. 16,452, and in said consolidated action No. 16,430, plaintiff [3] has paid to said firm sums in excess of \$25,000, of which the sum of \$10,000 was paid for services of said firm rendered to plaintiff subsequent to the issuance of said attachment and to secure the dissolution thereof; that is to say, that plaintiff has paid said sum of \$10,000 to said firm for services rendered by said firm subsequent to the 27th day of December, 1920, in defending said action No. 16,452, and said consolidated action No. 16,430, in so far as the same related to said action No. 16,452; that no part of said sum of \$10,000 was paid to said firm for services in or in connection with said original action No. 16,430, or said action No. 16,498, or said action No. 16,518, or for services in said consolidated action No. 16,430, except in so far as the same related to said action No. 16,452; that said sum of \$10,000 was the reasonable value of the services of said firm in procuring the dissolution of said attachment, and was a reason-

able sum for plaintiff to have paid to said firm for that purpose.

IV.

That plaintiff has sustained damages by reason of said attachment in the sum of \$10,000, which it has paid to said firm, as hereinbefore alleged; that although thereunto requested, defendant has not paid said sum of \$10,000, or any part thereof, to plaintiff, and that the whole of said sum is now due, owing and unpaid from defendant to plaintiff herein.

V.

That all and singular the matters and things alleged in this cause of action are ancillary to said action No. 16,452, and within the jurisdiction of this Honorable Court.

WHEREFORE, plaintiff prays judgment against defendant in the sum of \$10,869.10, together with interest on the sum of \$869.19 at the rate of seven per cent per annum from the 8th day of December, 1921, and for its costs of suit.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff. [4]

State of California,

City and County of San Francisco,—ss.

Alfred Sutro, being first duly sworn, deposes and says: That he is a member of the firm of Pillsbury, Madison & Sutro, attorneys for the plaintiff, Java Coconut Oil Company, Ltd., a corporation, named in the foregoing amended complaint; that the reason this affidavit is not made by an officer of said plaintiff, but is made by affiant, is that there

is no officer of the plaintiff in the city and county of San Francisco, State of California, where affiant resides and has his office; that affiant has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

ALFRED SUTRO.

Subscribed and sworn to before me this 14th day of June, 1922.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of
San Francisco, State of California. [5]

(Title of Court and Cause.)

Exhibit "A."

UNDERTAKING ON ATTACHMENT.

WHEREAS, the above-named Plaintiff has commenced, or is about to commence, an action in the So. Div. of Dist. Court of the U. S. for the No. District of California, 2d Div., against the above-named Defendant upon a contract for the direct payment of money, claiming that there is due to said Plaintiff from the said Defendants the sum of Twenty-seven thousand five hundred and no/100 Dollars, besides interest, and is about to apply for an attachment against the property of said Defendant as security for the satisfaction of any judgment that may be recovered therein;

NOW, THEREFORE, the undersigned Globe Indemnity Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and licensed to do a general surety business in the State of California, in consideration of the premises, and of the issuing of said attachment, does undertake in the sum of Fourteen Thousand (14,000) and no/100 Dollars, U. S. Gold Coin and promise to the effect, that if the said Defendants, or either of them, recover judgment in said action, the said Plaintiff will pay all costs that may be awarded to the said Defendants, or either of them, and all damages, which they, or either of them may sustain by reason of the said attachment, not exceeding the sum of Fourteen Thousand (14,000) and no/100 Dollars, and that if the said attachment is discharged on the ground that the Plaintiff is not entitled thereto under section five hundred and thirty-seven, Code of Civil Procedure, the Plaintiff will pay all damages which the Defendants or either of them may have sustained by reason of the attachment, not exceeding the sum specified in the undertaking.

In testimony whereof, the said surety has caused its corporate name and seal to be hereunto affixed by a duly [6] authorized Agent and atty.-in-fact at S. F., California, on the 27th day of December, A. D. 1920.

[Seal]

GLOBE INDEMNITY COMPANY.

By JOHN H. ROBERTSON,

Agent and Atty.-in-fact.

[Endorsed]: Filed Dec. 28, 1920. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of copy of the within amended complaint
is hereby admitted this 14th day of June, 1922.

HARTLEY F. PEART,
Attorney for Defendant.

[Endorsed]: Filed Jun. 15, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

[7]

(Title of Court and Cause.)

Demurrer.

Now comes the defendant in the above-entitled
action and demurring to the amended complaint of
the plaintiff herein as grounds of demurrer speci-
fies:

I.

That said amended complaint does not state facts
sufficient to constitute a cause of action.

II.

That said amended complaint is uncertain, am-
biguous and unintelligible in the particulars here-
inafter specified.

III.

That the first count or alleged cause of action
set up in said amended complaint does not state
facts sufficient to constitute a cause of action.

IV.

That the second count or alleged cause of action
set up in said amended complaint does not state
facts sufficient to constitute a cause of action.

V.

That said second count is uncertain in the following particulars:

1. That it cannot be ascertained therefrom what services were rendered by the law firm of Pillsbury, Madison & Sutro in defending said action No. 16,452 that would not have been rendered had no attachment been issued in said action.

2. That it cannot be ascertained therefrom what services were rendered by said Pillsbury, Madison & Sutro to secure a dissolution of said attachment other than services rendered in defending said action.

3. That it cannot be ascertained therefrom whether or not the sum of ten thousand (10,000.00) dollars alleged to have been paid to said Pillsbury, Madison & Sutro for services rendered by them subsequent to the issuance of said [8] attachment embraced services rendered subsequent to said time in the prosecution of plaintiff's cross-complaint in said action No. 16,430 wherein plaintiff recovered a judgment against said Warren R. Porter in the sum of four hundred ninety-four thousand four hundred ninety-eight and 30/100 (494,498.30) dollars.

4. That it cannot be ascertained therefrom how or why it became necessary in order to secure a dissolution of said attachment to prosecute a cross-complaint against said Warren R. Porter to recover said sum of four hundred ninety-four thousand four hundred ninety-eight and 30/100 (494,498.30) dollars.

5. That it cannot be ascertained therefrom how defendant can be liable for costs incurred by plaintiff in the prosecution of its said cross-complaint against said Porter.

6. That it cannot be ascertained therefrom what costs were incurred by plaintiff in defending said action No. 16,452, and what costs were incurred by it in the prosecution of its said cross-complaint against said Porter.

7. That said second count is ambiguous in the same respects in which it is herein alleged to be uncertain.

8. That said second count is unintelligible in the same respects in which it is herein alleged to be uncertain.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant have judgment for its costs.

HARTLEY F. PEART,
Attorney for Defendant.

Receipt of copy of the within demurrer this 25th day of July, 1922, is hereby admitted.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 25, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[9]

At a stated term, to wit, the July Term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 18th day of September, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

**Minutes of Court — September 18, 1922 — Order
Overruling Demurrer to Amended Complaint.**

Defendant's demurrer to the amended complaint heretofore submitted to the Court, Judge Dietrich presiding, being fully considered it is ordered that the memorandum opinion of Judge Dietrich be filed and that in accordance with said opinion, the demurrer to amended complaint be and is hereby overruled. [10]

(Title of Court and Cause.)

**Memorandum Decision upon Demurrer to Amended
Complaint.**

Sept. 14, 1922.

PILLSBURY, MADISON & SUTRO, Attorneys
for Plaintiff.

HARTLEY F. PEART, Attorney for Defendant.

DIETRICH, District Judge.—The questions presented by the demurrer to the amended complaint

are identical with those involved in a similar demurrer to the amended complaint in No. 16,715, Java Coconut Oil Company, Ltd., a corporation, plaintiff, vs. Fidelity & Deposit Company of Maryland, a corporation, defendant, and the memorandum decision just filed in that case may be regarded as the decision in this case.

Accordingly the demurrer will be overruled.

[Endorsed]: Filed Sept. 18, 1922. Walter B. Maling, Clerk. [11]

(Title of Court and Cause.)

Answer to Amended Complaint.

Now comes the defendant in the above-entitled action and answering unto the amended complaint on file herein denies, admits, and alleges, as follows:

I.

Answering unto the first count set up in said complaint defendant:

1. Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in the first paragraph of said count wherein it is alleged that at all times thertin mentioned plaintiff was and is now a corporation, and therefore and upon that ground denies the same and the whole thereof.

2. Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph IV of said count wherein it is alleged that the actions numbered in this court No. 16,430, No. 16,498, and No.

16,518 arose out of the same transactions as No. 16,452 therein mentioned and involved issues substantially similar to those in action No. 16,452, and therefore and upon the same ground denies the same and the whole thereof.

3. Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in the fifth paragraph of said count, and therefore and upon that ground denies the same and the whole thereof.

4. Admits that costs were taxed in favor of defendant in the action referred to in said count as No. 16,452 in the sum of \$869.19, but alleges that all of said costs in excess of the sum of \$284.25 were incurred in the prosecution of a cross-complaint filed in said action and in action No. 16,430 by the defendant therein, the plaintiff herein, upon which cross-complaint said defendant, the plaintiff herein, recovered judgment against plaintiff in said action in the sum of \$494,498.30. [12]

5. Denies that the whole of said sum of \$869.19 or any part thereof or any sum at all is now, at any time, or at all was due, owing, and unpaid or due or owing or unpaid from defendant to plaintiff herein.

6. Denies that all and singular or all or singular the matters and things or matters or things or any thereof alleged in the said first count herein are ancillary to said action No. 16,452.

II.

Answering unto the second count set up in said complaint defendant:

1. Hereby refers to and repeats to all intents and purposes the same as if set forth herein at length, the denials and allegations contained in its foregoing answer to the first count or cause of action herein.

2. Denies that to procure the or any dissolution of the attachment referred to in said count it was necessary for plaintiff to defend said action No. 16,452 and/or said consolidated action No. 16,430.

3. Defendant has not information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph III of the second count wherein it is alleged that the plaintiff herein has paid to the said law firm of Pillsbury, Madison & Sutro sums in excess of \$25,000.00 for the services of the said firm in said action No. 16,452 and in said consolidated action No. 16,430, and therefore and upon that ground denies that plaintiff herein paid for said or any services rendered by said firm or any one in both or either of said actions sums in excess of \$25,000.00, or any part thereof or any sum at all. And according to its information and belief defendant denies that the sum of \$10,000.00 was paid for services to said firm rendered to plaintiff subsequent to the issuance of the said attachment, and denies that any sum was paid by plaintiff to said firm to secure the dissolution of said attachment. And denies that said sum of \$10,000.00 or any other sum was or is the reasonable or any value of said services of said firm in procuring the dissolution of said attachment [13] and denies that

said or any sum was a reasonable sum for the plaintiff to have paid said firm for that purpose.

4. Denies that plaintiff has sustained damages or any damage by reason of said attachment in the sum of \$10,000.00 or any part thereof or any sum at all; and denies that the whole of said sum or any part thereof or any other sum is now or at any time, or at all was due, owing, and unpaid or due or owing or unpaid from defendant to plaintiff herein.

5. Denies that all and singular or all or singular the matters and things or matters or things or any thereof alleged in said second count are ancillary to said action No. 16,452.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant have judgment for its costs.

HARTLEY F. PEART,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

Frank M. Hall, being first duly sworn, deposes and says: That he is an officer, to wit: Assistant Manager of Pacific Department of the Globe Indemnity Company, a corporation, the defendant in the within entitled action; that he has read the foregoing answer of said defendant and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief and as to those matters he believes it to be true.

FRANK M. HALL.

Subscribed and sworn to before me, this 13th day of October, 1922.

[Seal]

M. V. COLLINS,

Notary Public in and for the City and County of San Francisco, State of California. [14]

Receipt of a copy of the within answer is hereby admitted this 19th day of October, 1922.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 19, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

(Title of Court and Cause.)

Stipulation Waiving Jury.

It is hereby stipulated by and between the respective parties to the above-entitled action that a jury in said action be, and the same is hereby, waived.

Dated: San Francisco, April 17, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

HARTLEY F. PEART,

Attorney for Defendant.

Approved.

BOURQUIN,

Judge.

[Endorsed]: Filed Apr. 19, 1923. Walter B. Maling, Clerk. [16]

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial on the 25th day of April, 1923, being a day in the March, 1923 term, of said court, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed herein; Alfred Sutro, Esq., appearing as attorney for plaintiff and Hartley F. Peart, Esq., appearing as attorney for defendant; and the trial having been proceeded with and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys, having been submitted to the Court for consideration and decision; and the Court after due deliberation, having filed its opinion and ordered that judgment be entered in favor of plaintiff and against defendant in the sum of \$869.19, together with interest at 7% per annum from December 8, 1921, and for costs.

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Java Cocoanut Oil Company, Ltd., a corporation, plaintiff, do have and recover of and from Globe Indemnity Company, a corporation, defendant, the sum of nine hundred fifty-three and 70/100 (\$953.70) dollars, together with its costs herein expended taxed at \$20.10.

Judgment entered April 28, 1923.

WALTER B. MALING,

Clerk. [17]

United States District Court, California.

No. 16,715.

JAVA ETC. CO.

vs.

FIDELITY ETC. CO.

No. 16,716.

JAVA ETC. CO.

vs.

GLOBE ETC. CO.

(Decision, etc.)

These actions tried together are against sureties in undertakings on attachments against plaintiff. It appears that one Porter brought actions against plaintiff, it counterclaimed and cross-complained, itself brought actions against Porter, was attached, and itself attached, and defendants separately were Porter's sureties in his attachment undertakings; that a few days after levy in said actions, plaintiff gave to the marshal the statutory security for and secured discharge of the lien and release of the property; that in due time all the actions were consolidated and tried, resulting in judgment for plaintiff and against Porter in amount about \$500,000; that of the costs recovered, \$1591.64 are due to the action of the undertaking of the action first in the title named, and \$869.19 are due to the like of the action second so named; that of \$50,000 attorneys' fees paid by plaintiff in respect to the actions, no

allocation was made between services due to the attachments and services due to the actions otherwise; that of said fees, \$15,000 "is the reasonable value of the services rendered subsequent" to the levy of the attachment, "in defending" the action of the undertaking first aforesaid, original and consolidated, and \$10,000 are the like in respect to the action of the undertaking second aforesaid.

Plaintiff seeks recovery of said costs and fees upon the theory that the attachments endured until trial and determination of the actions upon the merits, that the latter was [18] necessary to dispose of the former, and that the whole of said disbursements are "costs awarded" and damages sustained "by reason of the attachment." In support it cites amongst others,

Gregory vs. Co. (Kan.), 185 Pac. 35;

Mosely vs. Co. (Idaho), 189 Pac. 862;

Crom vs. Henderson (Iowa), 175 N. W. 983;

Anvil Gold Co. case, 125 Fed. 725.

Defendant, *contra* so far as said fees are concerned, cites St. Josephs etc. Co. vs. Love (Utah), 195 Pac. 308, and other cases in it referred to. These cases and their citations disclose the conflict in respect to the extent that attorneys' fees are damages in attachments, and that, tho involving statutes of little or no material difference without review of them and their distinctions and differences, it suffices to say that it is believed the theory of defendants, viz., that reasonable attorneys' fees paid in respect to the attachments alone and not those paid in respect to the merits of the actions,

are damages "by reason of" the attachments and for which sureties are liable, is the better rule, sound in principle, sustained by superior authority, and further locally justified by analogy.

Attachments are incidents of an action, and are provisional remedies to secure the fruits of success in trial and determination of the action on the merits. Attorneys' services may or may not be required in respect to the attachments, but are required in respect to the action. Any services rendered to dispose of the attachments, are "by reason of" the attachments, but any rendered to dispose of the action and its merits are not "by reason of" the attachments. They are "by reason of" the action, quite a different thing in fact, statutes and undertaking. That by success upon trial of the action and its merits the attachments are dissolved, is an incidental consequence of services rendered in respect to the former and not to the latter. The rule is like that in respect to other provisional remedies, injunctions, replevin, receiverships. Altho no local court seems to have determined a like issue in an attachment action, the case of *Alaska Co. vs. Hirsch* (Cal.), 47 Pac. 127, is analogous in its rule that attorneys' [19] fees for dissolution of an injunction are damages "by reason of" it and recoverable from sureties, but not those for trial of the action and its merits, even tho in the latter the enjoined party succeeding, necessarily dissolves the injunction. Clearly, had the party enjoined secured its dissolution on bond, as the plaintiff in the instant case did the attachments, his claims of right to

assign attorneys' fees for trial of the action and its merits as damages "by reason of" the injunction, and to recover them from the sureties, would not have been bettered. So, here. Bonds given by plaintiff (perhaps in duty to minimize damages and the expense of which is awarded it), the levies and the liens and so the "attachments" were released although the writ was not located but endured until it necessarily fell by reason of judgment on the merits for plaintiff. The mere existence of a writ, however, gives no cause of action for damages in so far as attorneys' fees are concerned at least. See *Long vs. Bank (Idaho)*, 165 Pac. 1119. Attachment liens released "the attachments had spent their force and the surety companies became responsible for all damages attributable directly to the attachments." However, subsequent and indirect damages, due to "bringing of the actions may also have damaged or added to the damages, . . . but such result was not due to the attachment"; and the attaching party "and not the surety company was the party responsible therefor."

Fidelity Co. vs. Co., 189 U. S. 143, a case fairly analogous in facts and principle.

So too is the *Anvil Gold Co.* case, 125 Fed. 725. There as here, the "attachment" was dissolved on security bond, tho there, by order of Court; here, by order of statute. Attorneys' fees as costs or damages are not favored and are recoverable only when with clear support in contract or statute. Plaintiff not having segregated fees for services

due to the attachments from those due to the trial of the action, cannot recover for them. It may be on sufficient data an allowance might be made by the Court, but apparently plaintiff seeks all [20] or none.

So far as costs are concerned, defendants concede them and moved for judgment for plaintiff to that extent.

In argument, however, counsel suggests plaintiff ought not recover \$500 it paid for an attachment undertaking in one of the actions and prior to Porter's attachment and the Fidelity Co's. undertaking in the same action.

The sum is within the statutes and defendant's undertaking—"costs awarded," and hence, recoverable.

Unlike damages, costs are not by the statute limited to those "by reason of" the attachment, but include all by reason of or in the action. It is significant that the statute makes this distinction, and impels construction accordingly. Even as plaintiff above, defendant is disposed to ignore small things, advising the Court that if it does erroneously allow the item to plaintiff, no review will be sought, for—*De minimis non curat lex.*

A magnificent gesture to say the least, and a little more this exuberant generosity and lordly spirit, plaintiff's demands might have been paid in full without litigation. Plaintiff is entitled to recover the costs aforesaid, of and from defendants as follows:

From Fidelity Co. \$1591.64;

From Globe Co. \$869.19, with local legal interest from Dec. 8, 1921, and costs herein. Judgments accordingly.

April 28, 1923.

BOURQUIN, J.

[Endorsed]: Filed April 28, 1923. Walter B. Maling, Clerk. [21]

(Title of Court and Cause.)

Stipulation and Order Extending Time to and Including June 15, 1923, for Preparation, Settlement and Allowance of Bill of Exceptions.

It is hereby stipulated by and between the parties to the above-entitled action that the plaintiff above-named may have to and including the 15th day of June, 1923, within which to prepare, serve and file its proposed bill of exceptions in the above-entitled action.

It is further stipulated that said bill of exceptions may be signed, settled and allowed by the Judge of the above-entitled court during the next ensuing term of said court, as well as during the term in which the judgment in said action was rendered, and the jurisdiction of the above-entitled Court to act upon, settle and allow such bill of exceptions is hereby extended from the present term of said court to and including the next ensuing term of said Court, that is to say, to and including Monday, November 5, 1923.

Dated: San Francisco, May 4, 1923.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

REDMAN & ALEXANDER.

It is so ordered.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed May 8, 1923. Walter B.
Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[22]

(Title of Court and Cause.)

**Stipulation and Order Extending Time to and In-
cluding July 15, 1923, for Preparation of Bill
of Exceptions.**

It is hereby stipulated by and between the parties to the above-entitled action that the plaintiff above named may have to and including the 15th day of July, 1923, within which to prepare, serve and file its proposed bill of exceptions in the above-entitled action.

Dated: San Francisco, June 4, 1923.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

REDMAN & ALEXANDER,
Attorneys for Defendant.

It is so ordered.

VAN FLEET,
District Judge.

[Endorsed]: Filed Jun. 5, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[23]

(Title of Court and Cause.)

Stipulation and Order Extending Time to and Including August 15, 1923, for Preparation, Settlement and Allowance of Bill of Exceptions.

It is hereby stipulated by and between the parties to the above-entitled action that the plaintiff above named may have to and including the 15th day of August, 1923, within which to prepare, serve and file its proposed bill of exceptions in the above-entitled action.

Dated: San Francisco, July 3, 1923.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.
HARTLEY F. PEART,
Attorney for Defendant.

It is so ordered.

FRANK H. RUDKIN,
District Judge.

[Endorsed]: Filed Jul. 5, 1923, Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[24]

(Title of Court and Cause.)

Stipulation and Order Extending Time to and Including September 15, 1923, for Preparation, Settlement and Allowance of Bill of Exceptions.

It is hereby stipulated by and between the parties to the above-entitled action that the plaintiff above named may have to and including the 15th day of September, 1923, within which to prepare, serve and file its proposed bill of exceptions in the above-entitled action.

Dated: San Francisco, August 6th, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

HARTLEY F. PEART,

Attorney for Defendant.

It is so ordered.

WM. C. VAN FLEET,

District Judge.

[Endorsed] Filed Aug. 6, 1923. Walter B. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[25]

(Title of Court.)

No. 16,715.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Corporation,

Defendant.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corpora-
tion,

Defendant.

**Stipulation to Foregoing as the Bill of Exceptions
in Both the Above-entitled Actions and to the
Correctness of the Same.**

It is hereby stipulated that, subject to the hereinafter mentioned objection of the defendant in each action above entitled, the attached and foregoing may be and is the bill of exceptions in both the above-entitled actions and that separate bills of exceptions need not be prepared or filed therein; and that, subject to the said objection of said defendants, the above and foregoing constitutes a

true and correct bill of exceptions in said actions (said actions having been duly consolidated for trial) and contains all of the proceedings had and all of the evidence offered and received on the trial of said actions and all of the rulings of the Court made during the trial of said actions; and that, subject to said objection, the same may be settled and allowed as the bill of exceptions in said two actions and to said rulings and to the decision of the Court and said two actions, and each of them; the defendant in each of said actions objects to the matter contained in said bill of exceptions between line 7, page 54, to and including line 11, page 55 thereof, and asks that the same be stricken out, said objection having been proposed by said defendants as an amendment to said bill of exceptions within the time and in the matter required by law.

[26]

Dated: September 27, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

REDMAN & ALEXANDER,

Attorneys for Defendant Fidelity and Deposit Company of Maryland.

HARTLEY F. PEART,

Attorney for Defendant Globe Indemnity Company.

The objection aforesaid of defendants is sustained, and the subject matter thereof stricken from the bill, in that it is superfluous.

BOURQUIN, J.

* * * * *

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

. Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corporation,

Defendant.

Assignment of Errors and Prayer for Reversal.

Java Cocoanut Oil Company, Ltd., a corporation, plaintiff and plaintiff in error in the above-entitled cause, contends that in the record, opinion, decision and final judgment in said cause there is manifest and material error, and said plaintiff and plaintiff in error now makes, files and presents the following assignments on which it will rely in the prosecution of its writ of error in said cause:

I.

That the above-entitled court erred in ordering, in rendering and in entering the final judgment herein dated April 28, 1923.

II.

That the said court erred in not ordering, rendering and entering judgment for and in favor of the plaintiff in the sum of \$10,869.19, together with interest on the sum of \$869.19 at the rate of seven

per cent per annum from the 8th day of December, 1921, and for its costs of suit, as prayed in the amended complaint [30] herein.

III.

That the said court erred in holding, adjudging and determining that said plaintiff was entitled to judgment only in the sum of \$869.19, with local legal interest from December 8, 1921, and costs herein, and in not holding, adjudging and determining that plaintiff was entitled to judgment for attorneys' fees upon the second cause of action in the amended complaint herein.

IV.

That the said court erred in holding, adjudging and determining that said plaintiff was not entitled to recover attorneys' fees upon the second cause of action in the amended complaint herein, and in not ordering and entering judgment in plaintiff's favor for such fees.

V.

That the facts found by said court are insufficient to support the judgment herein, in so far as said judgment is that plaintiff do not have and recover attorneys' fees upon the second cause of action in the amended complaint herein.

VI

That the said court erred in holding, adjudging and determining that the security, given the United States marshal by the plaintiff to release its property from the attachment in said second cause of action referred to, discharged the said attachment.

VII.

That the said court erred in holding, adjudging and determining that plaintiff, not having segregated said attorneys' fees for services due to said attachment from those due to the trial of the action in which said attachment issued, cannot recover for them. [31]

VIII.

That the said court erred in holding, adjudging and determining that the attorneys' fees mentioned in the second cause of action of the amended complaint were not recoverable by plaintiff because they were not damages sustained by plaintiff by reason of said attachment.

IX.

That the said court erred in holding, adjudging and determining that services by plaintiff's attorneys to dispose of the action No. 16,452 and consolidated action No. 16,430, in the amended complaint mentioned, and the merits thereof, were not "by reason" of said attachment.

X.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the bond given the United States marshal by this plaintiff to release its property from attachment in action No. 16,430, mentioned in said amended complaint.

XI.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the bond given the United States

marshal by this plaintiff to release its property from attachment in action No. 16,452, mentioned in said amended complaint.

XII.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the judgment-roll and all the papers in the consolidated action No. [32] 16,430, mentioned in said amended complaint.

WHEREFORE, plaintiff prays that said judgment be reversed and that said court be directed to render and enter judgment in favor of plaintiff in the amount prayed in the amended complaint herein.

Dated: San Francisco, October 11th, 1923.

PILLSBURY, MADISON & SUTRO.

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[33]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a
Corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corpora-
tion,

Defendant.

Order Allowing Writ of Error.

On this 11th day of October, 1923, came the plaintiff herein, Java Cocoanut Oil Company, Ltd., a corporation, and filed herein and presented its petition praying for the allowance of a writ of error in the above-entitled action to the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to the Court that said petition be granted and a transcript of the record in said action upon the judgment therein rendered, duly authenticated, together with the assignment of errors, the original writ of error and citation, should be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as prayed, in order that such proceedings may be had as may be just to correct any errors:

NOW, THEREFORE, it is hereby ordered that a writ of error be and the same is hereby allowed herein as aforesaid, and that the said writ of error issue out of and over the seal of the above-entitled court; that the amount of bond on said writ of error be and the same is hereby fixed at \$500; that a true copy of the record, opinion of the court, bill of exceptions, [34] assignments of errors, and all proceedings and papers upon which the judgment herein was rendered, together with the prayer for reversal, original writ of error and citation, all duly authenticated according to law, shall be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in order that said court may inspect the same and take

such action thereon as it may deem proper according to law and justice.

Dated: San Francisco, October 11th, 1923.

(Sgd.) JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[35]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corporation,

Defendant.

Cost Bond in Error.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Java Cocoanut Oil Company, Ltd., a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation, as surety, are held and firmly bound unto the above-named Globe Indemnity Company, in the sum of Five Hundred Dollars (\$500), lawful money of the United States, to be paid to said Globe Indemnity

Company, for the payment of which well and truly to be made, said principal and said surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Executed and dated this 11th day of October, 1923.

WHEREAS in the above-entitled court, in a suit in said court between said Java Cocoanut Oil Company, Ltd., a corporation, [36] plaintiff, and said Globe Indemnity Company, a corporation, defendant, a judgment was entered against said defendant, but only for the sum of \$869.19, with interest from December 8, 1921, and costs of suit (the same being a lesser sum than that prayed by said plaintiff), and said plaintiff having obtained, or being about to obtain, from said court a writ of error to reverse the judgment in said action and a citation to said defendant citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, pursuant to said writ of error:

NOW, THEREFORE, the condition of this obligation is such, that if said Java Cocoanut Oil Company Ltd., a corporation, shall prosecute said writ of error to effect, and if it fails to make it plea good, shall answer all costs, then the above obligation to be void; otherwise to remain in full force and effect.

Said Hartford Accident and Indemnity Company, the surety herein, expressly agrees that in case of a breach of any condition hereof, the above-entitled court may, upon notice to it of not less than ten

days, proceed summarily in the above-entitled action to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and award execution therefor.

IN WITNESS WHEREOF, the undersigned, Java Cocoanut Oil Company, Ltd., a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation, as surety, have caused these [37] presents to be executed this 11th day of October, 1923.

JAVA COCOANUT OIL COMPANY, LTD.,

By PILLSBURY, MADISON & SUTRO,

Its Attorneys,

Principal.

[Seal] HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

By JAMES W. MOYLES,

Its Attorney in Fact.

Surety.

State of California,

City and County of San Francisco,—ss.

On the 11th day of October in the year one thousand nine hundred and twenty-three, before me, John McCallan, a notary public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared James W. Moyles, known to me to be the person whose name is subscribed to the within and annexed instrument, as the Attorney in fact of the Hartford Accident and Indemnity Company, and acknowledged to me that he subscribed the name of Hartford Accident and

Indemnity Company thereto as principal and his own name as the Attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year first above written.

[Seal]

JOHN McCALLAN.

Notary Public, in and for the City and County of San Francisco, State of California.

My commission will expire April 12, 1925.

The foregoing bond is hereby approved this 11th day of October, 1923.

(Sgd.) JOHN S. PARTRIDGE,

District Judge.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[38]

In the Southern Division of the United States Dis-
trict Court, Northern District of California,
Second Division.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a Cor-
poration,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corporation,
Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

Please prepare a transcript of the record for the Appellate Court in the above-entitled cause, and insert therein the following:

1. The amended complaint.
2. The demurrer to the amended complaint.
3. The order overruling the demurrer to the amended complaint.
4. The memorandum decision given by the Honorable Frank S. Dietrich, United States District Judge, in ruling upon the demurrer to the amended complaint.
5. The answer to the amended complaint.
6. The stipulation in writing waiving a jury.
7. The judgment entered herein on or about the 28th day of April, 1923.
8. The opinion of the above-entitled court by the Honorable George M. Bourquin, United States District Judge, dated April 28, 1923, and the order for judgment herein. [39]
9. Copy of stipulation attached to bill of exceptions in the case of Java Cocoonut Oil Company, Ltd., vs. Fidelity and Deposit Company of Maryland (No. 16,715), and on file with the papers in said last mentioned case, said stipulation referring to the correctness and use of said bill of exceptions.
10. All stipulations and orders extending time for the preparation and settlement of the bill of exceptions herein.

11. All papers filed by the plaintiff herein in the prosecution of its writ of error, including the petition for said writ of error, the assignment of errors and prayer for reversal, the order allowing the writ of error, the original writ of error and citation on writ of error, and the bond on writ of error.
12. This praecipe.

Dated: San Francisco, October 11th, 1923.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[40]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing forty (40) pages, numbered from 1 to 40, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$16.85; that said amount

was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 29th day of October, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk United States District Court, for the Northern District of California. [41]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corporation,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States, for the Southern Division of the Northern District of California, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is

in the said District Court before you, or some of you, between Java Cocoanut Oil Company, Ltd., a corporation, plaintiff, and Globe Indemnity Company, a corporation, defendant, a manifest error hath happened, to the great damage of said Java Cocoanut Oil Company, Ltd., as by its complaint appears, and it being fit and we being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, [42] distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city and county of San Francisco on the 4th day of December next, in the said Circuit Court of Appeals, to be there and then held, that the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 11th day of October, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence

of the United States the one hundred and forty-eighth.

[Seal]

WALTER B. MALING,

Clerk of the United States District Court, for the
Northern District of California.

By J. A. Schaertzer,

Deputy Clerk.

The above writ of error is hereby allowed.

JOHN S. PARTRIDGE,

Judge. [43]

Receipt of copy of the within writ of error is
hereby admitted this 11th day of October, 1923.

HARTLEY F. PEART,

Attorney for Defendant.

[Endorsed]: No. 16,716. Southern Division,
U. S. District Court, Northern District of California,
Second Division. Java Cocoanut Oil Company,
Ltd., a Corporation, Plaintiff, vs. Globe Indemnity
Company, a Corporation, Defendant. Writ of Er-
ror. Filed Oct. 13, 1923. Walter B. Maling, Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of
the United States, in and for the Northern District
of California, Second Division.

The record and all proceedings of the plaint
whereof mention is within made, with all things
touching the same, we certify under the seal of our
said court, to the United States Circuit Court of
Appeals for the Ninth Circuit, within mentioned,

at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of
California. [44]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 16,716.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff,

vs.

GLOBE INDEMNITY COMPANY, a Corporation,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to
Globe Indemnity Company, a Corporation,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city and county of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued out of and now on file in the clerk's office of the United States District

Court for the Southern Division of the Northern District of California, Second Division, in the above-entitled cause, wherein Java Cocoanut Oil Company, Ltd., a corporation, is plaintiff and plaintiff in error, and you, said Globe Indemnity Company, a corporation, are defendant and defendant [45] in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JOHN S. PART-
RIDGE, United States District Judge, this 11th day
of October, 1923.

JOHN S. PARTRIDGE,
United States District Judge. [46]

Receipt of copy of the within citation on writ of
error is hereby admitted this 11th day of October,
1923.

HARTLEY F. PEART,
Attorney for Defendant.

[Endorsed]: No. 16,716. Southern Division,
U. S. District Court, Northern District of California,
Second Division. Java Cocoanut Oil Company,
Ltd., a Corporation, Plaintiff, vs. Globe Indemnity
Company, a Corporation, Defendant. Citation on
Writ of Error. Filed Oct. 13, 1923. Walter B.
Maling, Clerk.

[Endorsed]: No. 4126. United States Circuit
Court of Appeals for the Ninth Circuit. Java Co-
coanut Oil Company, Ltd., a Corporation, Plaintiff

in Error, vs. Globe Indemnity Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed October 30, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 4125.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff and Plaintiff in Error,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Corporation,

Defendant and Defendant in Error.

No. 4126.

JAVA COCOANUT OIL COMPANY, LTD., a Corporation,

Plaintiff and Plaintiff in Error,

vs.

GLOBE INDEMNITY COMPANY, a Corporation,
Defendant and Defendant in Error.

**Stipulation and Order for Consolidation of Causes
and Printing of Record.**

It is hereby stipulated that the above-entitled actions may be consolidated for purposes of briefing and argument in the above-entitled court; that said actions may be docketed together in said court and that the records in said actions may be printed under one cover.

Dated: San Francisco, October 30, 1923.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff and Plaintiff in Error.

REDMAN & ALEXANDER,

Attorneys for Fidelity and Deposit Company of
Maryland, Defendant and Defendant in Error.

HARTLEY F. PEART,

Attorney for Globe Indemnity Company, Defendant
and Defendant in Error.

It is so ordered.

HUNT,

United States Circuit Judge.

[Endorsed]: Nos. 4125 and 4126. In the United States Circuit Court of Appeals for the Ninth Circuit. Java Cocoanut Oil Company, Ltd., a Corporation, Plaintiff and Plaintiff in Error, vs. Fidelity and Deposit Company of Maryland, a Corporation, Defendant and Defendant in Error. Java Cocoanut Oil Company, Ltd., a Corporation, Plaintiff and Plaintiff in Error, vs. Globe Indemnity Company, a Corporation, Defendant and Defendant in Error. Stipulation for Consolidation of Causes and Printing of Record. Filed Nov. 2, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

JAVA COCOANUT OIL COMPANY, LTD.

(a corporation),

Plaintiff in Error,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

(a corporation),

Defendant in Error.

No. 4125

JAVA COCOANUT OIL COMPANY, LTD.

(a corporation),

Plaintiff in Error,

vs.

GLOBE INDEMNITY COMPANY

(a corporation),

Defendant in Error.

No. 4126

BRIEF FOR PLAINTIFF IN ERROR.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff in Error.

ALFRED SUTRO,

EUGENE M. PRINCE,

Of Counsel.

FILED

MAY 22 1924

F. D. MONROTON

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IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

JAVA COCOANUT OIL COMPANY, LTD.

(a corporation),

Plaintiff in Error,

vs.

No. 4125

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

(a corporation),

Defendant in Error.

JAVA COCOANUT OIL COMPANY, LTD.

(a corporation),

Plaintiff in Error,

vs.

No. 4126

GLOBE INDEMNITY COMPANY

(a corporation),

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

These are two writs of error to the District Court for the Southern Division of the Northern District of California. The plaintiff in error, Java Coconut Oil Company, Ltd., a New York corporation, brought two actions in the District Court, one against Fidelity and Deposit Company of Maryland, the defendant in error in the

case numbered 4125 in the records of this court, and the other against Globe Indemnity Company, the defendant in error in the case here numbered 4126.

Each of the defendants had executed an attachment bond on behalf of one Warren R. Porter, as plaintiff in litigation which Porter had instituted in the District Court against the Java Company, the plaintiff here. The bond given by the Fidelity Company was posted in an action by Porter numbered 16,430 in the District Court, and the bond given by the Globe Company was posted in a similar action numbered 16,452. The two actions now before this court were brought on these bonds.

Both cases arise on substantially similar facts. Pursuant to written stipulation of the parties (Tr. pp. 20, 155) the two cases were tried together by the District Court without a jury (Tr. p. 31). By order of this court, the records in both cases have been printed under one cover, and the two causes consolidated for briefing and argument.

Both cases involve the same main question—whether attorneys' fees expended by a defendant in defeating an action can be recovered as damages from the surety on the attachment bond of the attachment plaintiff, it appearing that the attachment was regular on its face and could not have been dissolved except by successfully defending the case on its merits. Upon submission of the case the District Court, the Honorable George H. Bourquin presiding, held that such attorneys' fees are not damages caused by the attachment (Tr. pp. 22-26),

and that they cannot be recovered from the surety, although Honorable Frank S. Dietrich had previously overruled the defendants' demurrers to the amended complaints, and had held, in effect, that such attorneys' fees are recoverable (Tr. pp. 13-15).

There are several collateral questions besides the main question in the cases—for example, whether the liability of the surety is destroyed by the fact that the attachment defendant recovers on a counterclaim or cross-complaint, or by the fact that he posts a forthcoming bond to reobtain the attached property from the custody of the law. To these and other incidental questions we shall later on refer.

Both the amended complaints are in two counts. The second count in each case is for attorneys' fees. The recovery prayed on this count is \$15,000 in the action against the Fidelity Company and \$10,000 in that against the Globe Company (Tr. pp. 5, 142). The first count in each case prays the recovery of costs taxed in favor of this plaintiff in the Porter litigation (Tr. pp. 1, 139). The District Court held the plaintiff entitled to recover such costs (Tr. pp. 26, 20, 156) and entered judgment accordingly (Tr. pp. 20, 156). Neither of the defendants has taken out a writ of error; indeed, with what the trial court characterized as "A magnificent gesture" (Tr. p. 26), they expressly conceded that, as to the costs, the plaintiff was entitled to recover (Tr. pp. 25-26). A "little more this exuberant generosity and lordly spirit," the court observed, and "plaintiff's demands might have been paid in full without litigation" (Tr. p. 26).

The District Court first considered the question as to the defendants' liability for attorneys' fees in passing upon their demurrers to the amended complaints (Tr. pp. 10, 147).¹ Each amended complaint (Tr. pp. 1, 139) sets forth in substance that Porter brought an action against this plaintiff; that the respective defendant posted in such action an attachment bond on Porter's behalf; that the bond obligated the defendant, if Porter failed in his suit, to "pay all costs that may be awarded to the said defendants² or either of them and all damages which they or either of them may sustain by reason of the said attachment"; that on the strength of the bond Porter procured an attachment against the property of the plaintiff; that the various cases between Porter and the plaintiff were consolidated and tried; that this plaintiff, the defendant in the Porter cases, prevailed over Porter and recovered a judgment against him for \$494,498.30 and costs. It was further alleged in each amended complaint that, in order to dissolve Porter's attachment, it was necessary for this plaintiff, as defendant, to defend on the merits the suit in which the attachment issued, and that the plaintiff paid its attorneys for defending such suit and so procuring the dissolution of the attachment, the amount prayed as damages from the surety.

(1) The defendants had previously moved the court for an order directing the complaints, as originally filed, to be made more definite and certain. The court granted these motions, but did not pass upon the question whether the defendants were liable for attorneys' fees.

(2) The reason why the bonds read in the plural is Porter had joined as a party defendant with the Java Company, another corporation, the Oliefabrieken Insulinde, N. V. This corporation was not served with process and did not appear in any of the litigation here involved (Tr. p. 101).

Judge Dietrich overruled the demurrers (Tr. pp. 13, 150). The amended complaints, he decided, were "reasonably clear, and in each cause of action the facts pleaded are sufficient to entitle the plaintiff to relief" (Tr. pp. 14, 150-151). In amplification of this ruling he said (Tr. p. 14):

"By so holding I am not to be understood as foreclosing certain questions discussed by the defendant partly upon the assumption of facts appearing only by remote inference or in the records of the attachment cases. Those questions, it is thought, can be more safely answered when the evidence is in. The plaintiff has not seen fit to exhibit in full the records in the attachment cases, but has pleaded sparingly and cautiously, as is its right. Some of the essential averments may be difficult of proof, but at this juncture we are not at liberty to consider whether plaintiff will be able satisfactorily to establish the truth of its averments. *It has specifically alleged that, to procure the dissolution of the attachment upon which the bond in question was given, it was necessary for it to defend the action upon the merits, that plaintiff employed for such purpose a law firm, and that this firm represented it in such defense, which, as already suggested, it claims it was necessary to make for the purpose of ridding itself of the attachment.* It is further clearly claimed that the services for which the plaintiff now seeks reimbursement were rendered in the action in which the bond was given, and not in any other action, and were rendered subsequent to the issuance of the attachment and to secure its dissolution, and that the sum paid for the services was without any reference to services rendered in others of the consolidated suits.

Defendant now argues that under all the circumstances it must be apparent that the services were rendered primarily in defense of the suit, and that

the dissolution of the attachment was a mere incident. That may turn out to be true, but such a theory is not in harmony with the allegations of the pleading."

The decision on the demurrers thus involves, we think, a clear-cut ruling that attorneys' fees expended in defeating a claim on its merits are recoverable damages on an attachment bond, if, as here, the party attached cannot otherwise rid himself of the attachment.

The cases came on for trial before Judge Bourquin (Tr. pp. 30-31). In the meantime the defendants had stipulated that the respective amounts prayed by the plaintiff as attorneys' fees were, as the amended complaints alleged, the reasonable value of the services rendered by the plaintiff's attorneys *after* the levy of Porter's attachments, in *defending* his respective suits against the plaintiff (Tr. pp. 32-35). The evidence, introduced to support the remaining allegations of the amended complaints, was undisputed. The defendants introduced no evidence except the records in the Porter suits (Tr. p. 106 et seq.).

Judge Bourquin wrote an extensive opinion (Tr. pp. 22-26), deciding that the plaintiff could not recover attorneys' fees. In so deciding he expressed views which, we think, are at variance with the previous ruling of Judge Dietrich. Judge Dietrich had held that attorneys' fees for defending a suit on its merits might be recovered on the attachment bond. Judge Bourquin decided otherwise. The defendants' theory that attorneys' fees "paid in respect to the attachments alone",

he said, "and not those paid in respect to the merits of the action, are damages 'by reason of' the attachments and for which sureties are liable, is the better rule, sound in principle, sustained by superior authority, and further locally justified by analogy" (Tr. p. 23).

Although Judge Bourquin thus held that attorneys' fees "in respect to the merits" cannot be recovered upon an attachment bond, he concluded his discussion of this subject with a statement not strictly consistent, as we believe, with his own prior ruling. He said (Tr. p. 25):

"Attorneys' fees as costs or damages are not favored and are recoverable only when with clear support in contract or statute. *Plaintiff not having segregated fees for services due to the attachments from those due to the trial of the action, can not recover for them. It may be on sufficient data an allowance might be made by the Court, but apparently plaintiff seeks all or none.*"

The plain implication of this statement, we think, is that the plaintiff was entitled to recover something, but could recover nothing because it had prayed too much. Clearly, we think, the court, under its own ruling, should have made the allowance to which the plaintiff was entitled. All the necessary facts were before the court, because, as we said, the defendants had put in evidence the whole record of the Porter suits.

The situation, in other words, is that, although the evidence supporting the allegations of the amended complaints is uncontradicted, the judgments allow the plaintiff nothing on its second causes of action, despite

Judge Dietrich's decision that the facts pleaded were sufficient to support a recovery, and despite Judge Bourquin's ruling that, while the plaintiff had asked too much, it was nevertheless entitled to some allowance.

We believe that, by the great weight of authority, attorneys' fees for dissolving an ostensibly valid attachment, by defeating the attachment plaintiff on the merits of his case, are damages recoverable on an attachment bond. Clearly, therefore, we submit, since the defendants have stipulated that the amounts prayed are the reasonable value of the services of the plaintiff's attorneys in defending the attachment suits, the plaintiff is entitled to judgments for the amounts prayed in the amended complaints.

Before referring to the authorities, we call the court's attention to the prior litigation between Porter and this plaintiff. That litigation is, of course, the basis of the cases at bar, and it would therefore, we think, make for a clearer understanding of these writs of error if the court were, at the outset, apprised in a brief way of the essential facts concerning it.

There were four actions in the District Court between Porter and the plaintiff, numbered, respectively, 16,430, 16,452, 16,498 and 16,518 (Tr. pp. 108-112). Porter was the aggressor in the litigation and he commenced the first two of these suits, praying the recovery of \$172,-166.25 in number 16,430 and \$127,500 in number 16,452 (Tr. pp. 109-110). These were the suits in which the defendants posted the bonds here in suit. The second two suits were commenced by the plaintiff against

Porter, and they were respectively, for \$22,342.50 and \$65,826.68 (Tr. p. 111). The plaintiff also interposed a cross-complaint and counterclaim in each of the two actions commenced by Porter (Tr. pp. 109-110). In action number 16, 430 the plaintiff's cross-demand was for \$189,431.93 (Tr. p. 109) and in action number 16,452 for \$219,374.39 (Tr. p. 88).

All the Porter cases arose out of the same transaction and involved substantially similar issues (Tr. pp. 68-69). They were consolidated (Pl. Exh. 3, Tr. pp. 67-68) and tried before a jury. The trial lasted some three weeks. More than seventy witnesses were examined (Tr. p. 79). The jury decided against Porter and returned a verdict in favor of this plaintiff for \$494,498.30 and costs—practically the whole amount claimed (Tr. p. 86). The judgment entered on this verdict is still unsatisfied in an amount exceeding \$450,000 (Tr. pp. 4, 16).

The litigation involved claims for breach of warranty asserted by Porter and claims for goods sold and delivered and for damages asserted by the plaintiff, arising out of contracts between the parties for the purchase and sale of copra cake. The plaintiff in 1920 was importing copra cake from Java, and Porter was engaged in selling it as stock food among the cattlemen (see Tr. p. 83). During the spring and early summer of 1920 Porter made five written contracts to buy cake from the plaintiff (Tr. p. 68). The total price of the cake thus purchased was about a million dollars (Tr. p. 81) and the contracts provided for installment deliv-

eries at approximately monthly intervals through the period from July, 1920, to January, 1921 (Tr. pp. 74, 84).

By July, 1920, or thereabouts, the plaintiff had delivered to Porter copra cake worth at the contract prices some \$190,000 (Tr. p. 75). This cake Porter had accepted but not paid for. In the meantime the chaotic deflation period of mid-1920 had begun. Foreign trade came almost to a standstill. Copra cake wavered, weakened and slumped heavily in price (Tr. p. 84). Porter then refused to pay for the cake already delivered, claiming that it was not up to warranty (Tr. p. 83). Indeed, though he had accepted nearly \$200,000 worth of cake, resold it and pocketed the proceeds, he claimed that he had sustained loss by the plaintiff's alleged breach of warranty, and he threatened the plaintiff with suits for damages.

Matters were in this condition early in August, when the plaintiff's attorneys were employed (Tr. p. 74). These attorneys strongly advised that the difficulties between the parties be compromised (Tr. p. 79). Overtures to this end, however, came to nothing, and on August 28, 1920, Porter filed the first suit, praying \$143,566.25 damages for breach of warranty (Tr. p. 109), an amount later increased by an amended complaint to \$172,166.25 (Tr. p. 110). On September 10, 1920, the plaintiff filed its counterclaim and cross-complaint (Tr. p. 109).

During the months that followed installments of copra cake covered by the contracts kept arriving from Java

in San Francisco (Tr. p. 85). As each lot arrived the plaintiff tendered it to Porter and Porter as consistently refused to accept it (Tr. pp. 89-90). This continued until January, 1921, when Porter definitely repudiated all the contracts and refused to accept further deliveries (Tr. p. 90).

Porter meanwhile, on October 1, 1920, had commenced his second suit against the plaintiff (Tr. p. 110). The plaintiff rejoined with a cross-complaint and counter-claim (Tr. p. 110) and subsequently on January 19 and February 23, 1921, respectively, filed its two affirmative actions against Porter (Tr. p. 111).

During the early stages of the litigation the thought of settlement was renewed from time to time (Tr. p. 81). All idea of compromise ended, however, with Porter's first attachment on December 6, 1920 (Tr. pp. 81, 109). This attachment tied up, among other things, the cocoanut meal (Pl. Exh. 1, Tr. pp. 40, 46) which the plaintiff had ground from the rejected copra cake, in a strenuous effort to move the cake, despite the demoralization of the market (Tr. p. 81). The plaintiff then posted a forthcoming bond with the marshal to reobtain its property from his custody (Tr. pp. 93-95) and prepared to fight Porter's claims to a finish (Tr. pp. 81-82).

On December 27, 1920, Porter again procured an attachment against the plaintiff, this time in action number 16,452 (Tr. p. 110), and the plaintiff again obtained possession of its property by posting a bond with the marshal (Tr. pp. 96-97).

The foregoing are the two attachments involved in the cases at bar.³

The record shows that both Porter's attachments were ostensibly valid and that neither could have been defeated by motion or other direct proceeding to dissolve (Pl. Exh. 1, Tr. pp. 35-37; Pl. Exh. 2, Tr. pp. 58-66). The plaintiff was able to reobtain possession of the attached property by posting with the marshal the forthcoming bonds already mentioned, but it could not rid itself of the attachments except by successfully defending Porter's suits on their merits. It is on this ground that the plaintiff claims, as damages caused by the attachments, the attorneys' fees which it expended in such defense.

At the trial the defendants contended that the services of the plaintiff's attorneys were rendered, not in defeating Porter's claims, and so vacating the attachments, but solely in establishing the plaintiff's own demands against Porter. The record shows, however, that the same evidence both won the plaintiff's case and defeated Porter's. That evidence would necessarily have been introduced even if the plaintiff had had no cross-demands. All five of the contracts were involved

(3) In action number 16,430, the action involved in the present case against the Fidelity Company, the plaintiff, on its cross-complaint, had previously levied an attachment on Porter (Tr. p. 109). Subsequently the plaintiff levied three other attachments on Porter, one on its cross-complaint in action number 16,452 (Tr. p. 111), and one in each of its affirmative actions (Tr. pp. 111, 112). The plaintiff's attachment in action number 16,452 was levied after Porter's attachment (Tr. pp. 110-111), on which the Globe Company gave the bond here in suit. The defendants have not, up to this time, cited any authority to show that the plaintiff's attachments are material to the questions here involved, and these attachments, we think, need not be considered further.

in each of the two suits which Porter brought, and in which he levied his attachments (Tr. p. 77). The issue in those cases was exactly the same as the issue on the plaintiff's affirmative demands, namely, whether the cake was up to warranty. The witness Alfred Sutro conducted on the plaintiff's behalf the litigation against Porter, and he testified on these points as follows (Tr. pp. 76-77):

"Q. Mr. Porter had, as I understand you, repudiated certain contracts at that time existing between him and the Java Cocoanut Oil Company, at the time you were first consulted?

A. Yes.

Q. And those contracts were the basis of the counterclaim and cross-complaint filed by the Java Cocoanut Oil Company through your firm in the four actions mentioned in this complaint involved here?

A. I will answer that question by saying that they were the basis of Mr. Porter's two complaints against us; each one of the five contracts between Porter and the Java Company was involved in the two suits in which your company and Mr. Redman's company gave the bonds; and obviously we had to file counter-claims and cross-complaints in those suits because Porter had taken the cake under those contracts and had not paid for it, and we were permitted, as you know, under the Code, to file these counterclaims, because they arose out of the same transaction."

On the same subject he said (Tr. p. 87):

"A. * * * We could not establish our cross-complaint, the facts of our cross-complaint, which in substance were that this cake was as represented in the contract, without disputing Porter in his contention that we had breached the warranty contained in the contracts in giving him

inferior cake—the same witnesses were used, all of the witnesses were used for that double purpose absolutely and necessarily.”

And again (Tr. p. 105):

“Now, your Honor, I would like to state on re-direct examination, in view of the cross-examination, that the defense of the suit that was brought by Porter, the two suits that were brought by Porter, involved practically absolutely, I am using the word advisedly, the same work that we did in prosecuting the counter-claims and cross-complaints which we filed in these suits, and the complaints which were filed in the other two suits that were brought against Porter; that there were many witnesses whom we interviewed, and while we only had 48 testify, we had a good many more in reserve. There was not one, that I recall, who was limited to any particular matter as to any one suit; in fact, at the very beginning of the trial Judge Dooling ruled that he would consider that we should treat the cake in all of these shipments as the same kind of cake, and that there was one question before the jury, and that was as to the quality of the cake involved in all of these shipments; and that in order to defeat Porter in his two suits, we necessarily had to offer facts which, if the jury believed them, as they did, as we proved to them, entitled us to prevail in all of the suits.”

The total fee of the plaintiff's attorneys was \$50,000, and the plaintiff has paid this sum in full (Tr. p. 102). The \$50,000. was in payment for all services in the Porter suits, both in defending against Porter's claims and in prosecuting the plaintiff's cross-demands. The plaintiff's attorneys also rendered certain relatively minor services incidental to the Porter litigation; for instance, negotiations with one or two buyers of the

rejected cake and questions involving state and local taxation of the plaintiff's properties (Tr. pp. 100-102). For these incidental services no charge was made. Sutro testified (Tr. pp. 102-103):

"A. * * * I told you that this \$6,000 was paid February 27th; get this right, now. \$5,000 April 15, \$5,000 October 30, and that no charge was made for the various matters that I have mentioned outside of this litigation. But I mentioned them to you, because services were rendered to the concern, and Mr. Clements paid us \$50,000 for services in this litigation as such, and the other matters we allowed to go by default, if you please, we did not make a charge for them. We considered the \$50,000 as payment for the services in litigation between Porter and the Java Cocoanut Oil Company, and no charges were set up on our books for any other services.

Q. Did you bill them?

A. We did not bill them.

Q. But in your books you charged it to this litigation?

A. This litigation; it is credited to the Java Cocoanut Oil Company, and no charges were set up for services outside of this litigation. I simply mention this to you so that you will be set entirely right as to what transpired between that concern and ourselves. I may further say to you, I don't know whether you got it, that Mr. Clements told me if we could collect that judgment he would be very glad to pay us \$100,000, because he had never seen better, more efficient or extensive work done.

Q. In the procuring of the judgment?

A. In the securing of the judgment."

No part of the total charge of \$50,000. was specifically allocated to the defense of Porter's actions as distinguished from the other services in the litigation (Tr.

pp. 99-100). The amended complaints, however, allocated \$25,000., or half the total fee, to such defense—\$15,000. to the defense of action number 16,430, in which the Fidelity Company posted the attachment bond, and \$10,000. to the defense of action number 16,452, in which the Globe Company gave its bond. The defendants stipulated, as we have pointed out, that these amounts were the reasonable value of the services of the plaintiff's attorneys in *defending* Porter's actions against the plaintiff *after* the levy of Porter's attachments. The stipulation by the Fidelity Company reads as follows (Tr. pp. 32-33):

“(Title of Court and Cause.)

It is hereby stipulated by and between the respective parties to the above-entitled action that the sum of \$15,000 is the reasonable value of the services rendered *subsequent* to the 20th day of December, 1920, by Messrs. Pillsbury, Madison & Sutro as attorneys for plaintiff, *in defending the original action No. 16,430, referred to in the complaint herein, and consolidated action No. 16,430, in so far as the same relates to said original action No. 16,430.*

Defendant makes this stipulation subject to the reservation that it shall not be construed as an admission by defendant that the facts stipulated to are admissible in evidence in this case, and defendant hereby objects to their admission upon the ground that they are irrelevant, immaterial and incompetent, defendant hereby stating that its position in this behalf is that the said services rendered by plaintiff's attorneys in the defense of such action were not rendered for the purpose of securing a release of the attachment levied by the plaintiff in the attachment suits, but for the purpose of defeating the claims asserted by said

plaintiff in this complaint in said action, and for the purpose of establishing the counterclaims asserted by the defendant in its answer in said action.

Dated: San Francisco, April 17, 1923.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff,
REDMAN & ALEXANDER,
Attorneys for Defendant.”

The stipulation made by the Globe Company is the same, except that it refers to action number 16,452 and the amount stipulated to is \$10,000. instead of \$15,000. (Tr. p. 34).

Under the circumstances shown by the record, we submit that the attorneys' fees here sued for are damages for which the defendants are liable. Furthermore, we submit, the liability of the defendants is not impaired by the circumstance that the plaintiff recovered judgment on its cross-demands, or by the fact that it gave forthcoming bonds to secure possession, pending judgment, of the property seized by the marshal.

SPECIFICATION OF THE ERRORS RELIED UPON.

The specifications of error upon which the plaintiff relies on the writ of error in the action against the Fidelity Company are as follows (Tr. pp. 119-122):

I.

That the above-entitled court erred in ordering, in rendering and in entering the final judgment herein dated April 28, 1923.

II.

That said court erred in not ordering, rendering and entering judgment for and in favor of the plaintiff in the sum of \$16,591.64, together with interest on the sum of \$1591.64 at the rate of seven per cent per annum from the 8th day of December, 1921, and for its costs of suit, as prayed in the amended complaint herein.

III.

That the court erred in holding, adjudging and determining that said plaintiff was entitled to judgment only in the sum of \$1591.64, with local legal interest from December 8, 1921, and costs herein, and in not holding, adjudging and determining that plaintiff was entitled to judgment for attorneys' fees upon the second cause of action in the amended complaint herein.

IV.

That the said court erred in holding, adjudging and determining that said plaintiff was not entitled to recover attorneys' fees upon the second cause of action in the amended complaint herein, and in not ordering and entering judgment in plaintiff's favor for such fees.

V.

That the facts found by said court are insufficient to support the judgment herein, in so far as said judgment is that plaintiff do not have and recover attorneys' fees upon the second cause of action in the amended complaint herein.

VI.

That the said court erred in holding, adjudging and determining that the security, given the United States marshal by the plaintiff to relieve its property from the attachment in said second cause of action referred to, discharged the said attachment.

VII.

That the said court erred in holding, adjudging and determining that plaintiff, not having segre-

gated said attorneys' fees for services due to said attachment from those due to the trial of the action in which said attachment issued, cannot recover for them.

VIII.

That the said court erred in holding, adjudging and determining that attorneys' fees mentioned in the second cause of action of the amended complaint were not recoverable by plaintiff because they were not damages sustained by plaintiff by reason of said attachment.

IX.

That the said court erred in holding, adjudging and determining that services by plaintiff's attorneys to dispose of the action No. 16,430, in the amended complaint mentioned, and the merits thereof, were not "by reason" of said attachment.

X.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the bond given the United States marshal by this plaintiff to release its property from attachment in action No. 16,430, mentioned in said amended complaint.

XI.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the bond given the United States marshal by this plaintiff to release its property from attachment in action No. 16,452, mentioned in said amended complaint.

XII.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the judgment-roll and all the papers in the consolidated action No. 16,430, mentioned in said amended complaint.

The plaintiff's specifications of error in the action against the Globe Company are the same as the foregoing, so far as questions of law are concerned. We will, therefore, not print them at length, but respectfully refer the court to the foregoing and also to the assignments of error in the Globe Company case, which are printed in the record (Tr. pp. 170-173).

ARGUMENT.

FIRST: THE ATTORNEYS' FEES PAID BY THE PLAINTIFF IN DEFENDING PORTER'S ACTIONS ON THE MERITS ARE DAMAGES FOR WHICH THE DEFENDANTS ARE LIABLE.

A. The Authorities. The bonds in suit (Tr. pp. 8, 145) were both posted under Section 539 of the California Code of Civil Procedure. That section provides in part as follows:

“Before issuing the writ (of attachment), the clerk must require a written undertaking on the part of the plaintiff, * * * with sufficient sureties, to the effect that *if the defendant recovers judgment*, the plaintiff will pay all costs that may be awarded to the defendant *and all damages which he may sustain by reason of the attachment*, not exceeding the sum specified in the undertaking * * *

* * *” (italics ours).

The statute thus imposes liability for damages on the surety “if the defendant recovers judgment”. The sole question, therefore, to be determined is whether the attorneys' fees claimed by the plaintiff are damages “by reason of the attachments”. This question, since it involves the construction of a state statute, depends upon

the state law, if the state law can be ascertained (*Fidelity & Deposit Co. of Maryland v. L. Bucki etc. Lumber Co.*, 189 U. S. 135, 137).

So far as we are advised, there is no California decision definitely settling the question here involved, though the point has been raised in several California cases. The first of these cases was *Heath v. Lent*, 1 Cal. 410, decided in 1851, long before the adoption of the codes. The State Supreme Court there stated that "counsel fees constitute no part of the damages for a wrongful attachment" (p. 412). Two years later, in *Ah Thae v. Quan Wan*, 3 Cal. 216, the question of attorney's fees as damages again arose, this time in a suit on an injunction bond. The court definitely and expressly overruled *Heath v. Lent*, and held that the fees sued for could be recovered.

The precise question, whether attorney's fees expended in dissolving an attachment valid on its face, by defeating on its merits the suit in which the writ issued, was raised in *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563. The plaintiff there sued on an attachment bond, setting up as a second cause of action a claim for such attorney's fees. The trial court sustained a demurrer to this count. The Supreme Court held that an attachment bond under Section 539 of the Code of Civil Procedure is

"a contract to indemnify the defendant for all costs that may be awarded to him, and all damages which he may sustain by reason of the attachment, in the event of his recovering judgment" (97 Cal. 493).

The court decided, however, that the trial court had properly sustained the defendant's demurrer to the plaintiff's count for attorney's fees, for the reason that the plaintiff had only alleged that he had "incurred" the fees, not that he had paid them. *This was the sole ground of the decision.* "The damage", the court said, "accrues from the payment and not from incurring the liability so to do" (97 Cal. 495). On this point, we may add, the court only applied the rule which had been settled in California many years before; that no item of expense can ordinarily be recovered on an attachment or injunction bond unless it has been actually paid (*Wilson v. McEvoy*, 25 Cal. 169, 174; *Prader v. Grimm*, 28 Cal. 11, 13; *Roussin v. Stewart*, 33 Cal. 208, 212). The court, in *Elder v. Kutner*, did not intimate that the plaintiff's count for attorney's fees was insufficient in any other particular. On the contrary, it specifically pointed out that *Heath v. Lent* (supra, p. 21) had been overruled (97 Cal. 494), and under the rule stated in *Heath v. Lent*, of course, the fees could not have been recovered at all. The plain intimation in *Elder v. Kutner* is that the plaintiff could have recovered the attorney's fees if he had actually paid them. In the cases at bar the plaintiff has paid the fees for which it sues (Tr. pp. 69, 100, 102). Clearly, therefore, we submit, the law in California appears to be that a plaintiff, under circumstances such as prevail in the cases at bar, is entitled to recover.

In a number of other states the question, whether the surety on an attachment bond is liable for attorney's fees for defeating on the merits the claim underlying an ostensibly valid attachment, has been definitely settled in the affirmative; the rule, by the weight of authority, is that, under such circumstances, the surety must pay the attorney's fees.

Before discussing the cases just mentioned we call the court's attention to two preliminary considerations. First, each of Porter's two attachments was regular on its face (Tr. pp. 8, 145); neither could have been dissolved except by a trial on the merits. Under well settled rules, therefore, the liability of the defendants is not affected by the circumstance that the plaintiff made no formal motions to vacate or dissolve the attachments (*Moseley v. Fidelity Co.*, 33 Idaho 37, 189 Pac. 862, 865; *Parish v. Van Arsdale Brokerage Co.*, 92 Kan. 286, 140 Pac. 835, 837; *Balinsky v. Gross*, 72 Misc. 7, 128 N. Y. S. 1062, 1063; *Straschitz v. Ungar*, 153 N. Y. S. 118). Second, the defendants admitted at the trial that an attachment surety is liable for attorney's fees spent in procuring the dissolution of the attachment. It clearly follows, therefore, we think, that the surety should be liable for attorney's fees spent in a successful defense on the merits, where, as here, the attachment could not have been otherwise dissolved. That the surety is liable under such circumstances is, we submit, clearly shown by the cases.

Gregory v. United States Fidelity & Guaranty Co., 105 Kan. 648, 185 Pac. 35, was, in many respects, strikingly

similar to the cases at bar. There a corporation, the Harbor Business Blocks Company, brought two actions on promissory notes against one Elizabeth Gregory. She joined issue on the Harbor Company's claims and filed a cross-petition to recover payments which she had made on other notes. The cases were consolidated and tried. Mrs. Gregory prevailed on the merits, defeated the Harbor Company's claims and recovered on her own cross-demand. During the litigation the Harbor Company had levied an attachment and posted an attachment bond similar, in all essential respects, to the bonds in the cases at bar. Mrs. Gregory sued the surety on this bond to recover damages, including fees paid her attorneys for services touching the merits of the consolidated suit. The court pointed out that the plaintiff could not have dissolved the attachment except by a favorable judgment on the merits, and held that the attorney's fees, therefore, were damages by reason of the attachment. It made no difference, the court said, that the plaintiff might have defended the suit, even if no attachment had been levied. The court said (135 Pac. 38):

“By their findings the jury allowed plaintiff \$1,250 for attorney's fees, reasonably paid in procuring the discharge of the attachment, \$800 for expenses in procuring evidence to discharge the attachment, \$40. traveling expenses necessarily incurred in attending court. It is contended that these costs and expenses were not occasioned by the attachment. The argument is that, the attachment being a mere ancillary proceeding, it must be assumed that the plaintiff would have paid out just as much for the purpose of establishing her

defense against the promissory notes and for the purpose of recovering upon her cross-petition (which was for the amount she had paid upon previous notes) as if there had been no attachment levied. Perhaps this is true, but in order to have the attachment dissolved it was necessary for her to establish the fact that she was not indebted upon the cause of action sued upon, and the same evidence also established her right to judgment for the cancellation of all the notes, and for the other relief granted. The defendant's contention in this respect is fully answered by the decision in *Parish v. Brokerage Co.*, 92 Kan. 286, 140 Pac. 835, where it was held that expenses necessarily incurred in procuring the dissolution of an attachment wrongfully issued, and the release of property unlawfully seized, including attorney's fees and the cost of depositions may be recovered by the owner in an action on the attachment bond."

In *Wilson et al. v. Root et al.*, 43 Ind. 486, the plaintiffs sued the sureties on an attachment bond to recover, among other things, attorney's fees for services relating to the merits of the attachment suit. The defendants claimed, like the defendants here, that "the damages sustained by the plaintiffs grew out of the action * * * against them and their defense of the same, and not out of the attachment or the defense of the same" (p. 489). The court held that, since the attachment could not have been dissolved without a trial on the merits, the plaintiffs were entitled to recover the attorney's fees. The court said (p. 493):

"There may be different results in an action in connection with which an attachment has been sued

out: 1st. The action and the attachment may both be sustained; in which case there can be no suit upon the undertaking. 2d. The action may be sustained, and the attachment may not be sustained, but may have been wrongful and oppressive; in which case it would seem that the attorney's fees for defending against the attachment should be allowed in an action on the undertaking, but not those for defending the action. 3d. When the action and the attachment have both been defeated, there having been no foundation for the action, and consequently no right to sue out the attachment; in which case it seems to us that there can be no distinction made between services rendered in the defense of the action and those rendered in defense of the attachment. In such a case we think the reasonable attorney's fees of the defendant in the action in which the attachment was sued out, for defending both the action and attachment, may be included in the damages allowed in a suit on the undertaking."

A like ruling was made in *Crom v. Henderson*, 188 Iowa 227, 175 N. W. 983. The court said in part (175 N. W. 988):

"While it is true that it has been said by this court, and is the law, that one can only recover those attorney's fees which have been expended in defending against the attachment, the fact that the defense goes to the merits does not, of itself, defeat the right to attorney's fees, if the defense made strikes at the very root of the right to the attachment. Where a defense is made on the counterclaim, based upon the fact that there was nothing due the plaintiff at the time the suit was brought, and that the plaintiff had no reasonable ground for believing that there was anything due, the proof of these two facts sustains the claim that the attachment was wrongfully sued out. The

fact that the same proof operates both to defend against the suit and to prove that the attachment was wrongfully sued out does not militate against the right of the plaintiff to recover attorney's fees for defending against the attachment."

In *Straschitz v. Ungar*, 153 N. Y. S. 118, the court, in allowing attorney's fees as damages in a suit on an attachment bond, said (p. 118):

"It is well settled that, where the trial of the action is rendered necessary to dissolve an attachment, the expenses of the trial are recoverable."

In each of the following cases it was likewise held that the surety on an attachment bond is liable for attorney's fees for defeating the attachment plaintiff on the merits, if the attachment was regular on its face and could not have been dissolved except by judgment on the merits. See

ALABAMA:

Street v. Browning, 205 Ala. 110, 87 So. 527, 528.

GEORGIA:

Oakes v. Smith, 121 Ga. 317, 48 S. E. 942;

Collins v. Myers (Ga. App.), 117 S. E. 265, 266.

IDAHO:

Moseley v. Fidelity etc. Co., 33 Idaho 37, 189 Pac. 862, 864-865.

INDIANA:

Wilson et al. v. Root et al., 43 Ind. 486; supra pp. 25-26.

IOWA:

Whitney v. Brownell, 71 Iowa 251, 32 N. W. 285, 287;

Union Mill Co. v. Prenzler, 100 Iowa 540, 69 N. W. 876, 879.

KANSAS:

Parish v. Van Arsdale etc. Co., 92 Kan. 286, 140 Pac. 835, 837.

LOUISIANA:

Jones v. Doles, 3 La. Ann. 588, 589;

Bonner v. Copley, 15 La. Ann. 504, 505.

MISSOURI:

State v. McHale, 16 Mo. App. 478, 483;

State v. Coombs, 67 Mo. App. 199, 203 (overruled on another point, *State v. Fargo*, 151 Mo. 280, 52 S. W. 199);

State v. Thomas, 19 Mo. 613;

State v. Beldsmeier, 56 Mo. 226.

NEW MEXICO:

Territory v. Rindscoff, 4 N. M. 363, 20 Pac. 180.

NEW YORK:

Holly v. Rosenstein, 94 Misc. 292, 158 N. Y. S. 226-228;

Cook v. National Surety Co., 169 App. Div. 656, 155 N. Y. S. 493, 494;

Balinsky v. Gross, 72 Misc. 7, 128 N. Y. S. 1062, 1063;

Ives v. Ellis, 35 Misc. 333, 71 N. Y. S. 971, 972 (Aff. 67 App. Div. 619, 73 N. Y. S. 1137);
Tyng v. American Surety Co., 69 App. Div. 137, 74 N. Y. S. 502, 503 (Aff. 174 N. Y. 166, 66 N. E. 668).

B. The Cases Cited by the Trial Court. The only case cited by the trial court holding that attorney's fees for services in dissolving an attachment regular in form, by defeating the attachment suit on its merits, are not damages recoverable on an attachment bond, is *St. Joseph Stock Yards Co. v. Love*, 57 Utah 450, 195 Pac. 305. That case, we contend, is not a sound precedent; it is contrary to the weight of authority, and rests, we submit, upon an incorrect analysis of the authorities.

The Utah court based its decision upon the case of *Northampton National Bank v. Wylie*, 62 Hun. 146, 4 N. Y. S. 907. The rule in New York, however, is settled by a series of later decisions, that where a trial on the merits is necessary to dissolve an attachment, then attorney's fees for services touching the merits can be recovered as damages on the attachment bond (*Holly v. Rosenstein*, 94 Misc. 292, 158 N. Y. S. 226-228; *Cook v. National Surety Co.*, 169 App. Div. 656, 155 N. Y. S. 493, 494; *Balinsky v. Gross*, 72 Misc. 7, 128 N. Y. S. 1062, 1063; *Ives v. Ellis*, 35 Misc. 333, 71 N. Y. S. 971, 972 (Aff. 67 App. Div. 619, 73 N. Y. S. 1137); *Tyng v. American Surety Co.*, 69 App. Div. 137, 74 N. Y. S. 502, 503 (Aff. 174 N. Y. 166, 66 N. E. 668);

Straschitz v. Ungar, 153 N. Y. S. 118). In so far, therefore, as the *Northampton Bank* case stands for the rule to which the court in the *Love* case cited it, it must, we think, be regarded as overruled by the later decisions.

We have already called attention to the long line of Iowa cases upholding the rule for which we contend. In the *Love* case the Utah court referred to the Iowa cases, but went on to say that they were based upon a special statute providing, in express terms, for the allowance of attorney's fees (195 Pac. 308-309). The court then quoted Section 3887 of the Iowa code, but quoted it apart from its context and construed it incorrectly. That section had nothing whatever to do with the Iowa cases, which, according to the *Love* case, were expressly based upon it. It is true that the section provides for attorney's fees, but not for attorney's fees spent in defending the attachment suit. It allows attorney's fees as costs in a suit against the surety on the attachment bond, to recover damages, including attorney's fees. To illustrate: If there were a California statute corresponding to Section 3887 of the Iowa code, then this plaintiff would be entitled, under such statute, to the fees of its attorneys in prosecuting the cases at bar, that is to say, in these actions against the sureties to recover damages on the attachment bonds.

The purpose and effect of Section 3887 of the Iowa code was pointed out in *Peters et al. v. Snively-Ashton*,

144 Iowa 147, 122 N. W. 836. The Supreme Court of Iowa there said (p. 836):

“There is some confusion in our cases upon this subject, due to what we now believe to have been a misapprehension of the effect of section 3887 of the Code. We have said in some of these cases that attorney’s fees are to be fixed by the court, and are not to be considered by the jury in awarding the damages. *Dickinson v. Athey*, 96 Iowa, 363, 65 N. W. 326; *Porter v. Knight*, 63 Iowa 365, 19 N. W. 282. But in each of these cases the only question was the allowance of attorney’s fees to be made under that section, *which are to be allowed, as we now think, as part of the costs, not for defending against the attachment, but for the prosecution of the action on the bond*, either in an original proceeding or by way of counterclaim. The statute itself provides that defendant shall be allowed the actual damages sustained and reasonable attorney’s fees to be taxed by the court. *The attorney’s fees here mentioned are not the damages for securing the release of the attachment, but are allowed as part of the costs of the action to recover the damages.* This is the only theory upon which such attorney’s fees may be fixed by the court. They are not a part of the original damages; for, if they were, a jury and not the court would have power to fix and allow the same. *Weller v. Hawes*, 49 Iowa 45; *Porter v. Knight*, 63 Iowa 365, 19 N. W. 282. These attorney’s fees are not to be considered as part of the damages. *In the action on the bond we are constrained to hold that attorney’s fees for securing the release of the attachment, or of the attached property, may properly be considered as part of the damages sustained by the attachment defendant.* * * *

If, then, attorney’s fees may be allowed as an item of actual damages, it is clear that the section of the Code has no reference to these, but to

attorney's fees for prosecuting the action on the bond."

The foregoing clearly shows that the Iowa cases heretofore cited were not based upon express statutory provisions, as the Utah court in the *Love* case said. They were, as the opinions plainly state, based upon the principle that, where a defense on the merits is necessary to vacate an attachment, then the costs of such defense, including attorney's fees, are damages caused by the attachment.

Under the circumstances, we submit, the *Love* case is not a sound authority and does not support the judgments of the trial court in the cases at bar.

The trial court also referred, in support of its decision to the case of *Fidelity & Deposit Co. of Maryland v. L. Bucki etc. Co.*, 189 U. S. 135, as "fairly analogous in facts and principle" (Tr. p. 25). That case, we submit, so far as it is in point, supports our contention. The attachments involved in that case were intrinsically irregular and had been dissolved by a direct proceeding to that end. The attachment defendant sued on the attachment bond to recover the fees it had paid its lawyers for services in the dissolution proceedings. The jury awarded \$7500. for such fees. The trial court held the allowance improper, but the Circuit Court of Appeals for the Fifth Circuit reversed the judgment (109 Fed. 394). The ruling of the Circuit Court of Appeals was affirmed by the Supreme Court. The *Bucki* case, therefore, is a case in which attorney's fees in a substantial amount, \$7500., were awarded as dam-

ages on an attachment bond. The precise question, however, whether attorney's fees with respect to the merits can be recovered on such a bond was not involved or mentioned in the *Bucki* case. There the attachments were dissolved independently of a trial on the merits.

The trial court also referred to the case of *Alaska Improvement Co. v. Hirsch*, 119 Cal. 249, 47 Pac. 124, 127. That was a suit on a preliminary injunction bond. In upholding a judgment on the bond Department Two of the Supreme Court of California said, in effect, that attorney's fees paid for defending an injunction suit on its merits cannot be recovered from the sureties.⁴

We submit, however, that preliminary injunction bonds are not analogous to attachment bonds. Even if it were the rule that attorney's fees for defeating a final injunction cannot be recovered as damages on a preliminary injunction bond, that, we submit, would not make against the contention of the plaintiff here. The right to an injunction does not necessarily follow the establishment of a cause of action. The plaintiff may be entitled to relief, but not entitled to an injunction. Injunctions, therefore, can be and often are dissolved independently of the defendant's prevailing on the merits of his case. On the other hand, *an*

(4) In this case a rehearing was granted, and the Supreme Court of California, in Bank, dismissed the suit on the ground that the bond was not supported by a consideration. The statements in the department opinion concerning attorney's fees, therefore, were no part of the final decision.

attachment valid on its face cannot be dissolved except by a successful defense on the merits.

Furthermore, in purpose and effect a preliminary injunction is diametrically opposite to an attachment. The whole purpose of a preliminary injunction is to *prevent* irreparable injury. It keeps matters as they are, pending determination of the merits of the controversy. The court issues a preliminary injunction only on notice and after ascertaining the balance of convenience between the parties (*Magruder v. Belle Fourche etc. Assoc'n.*, 219 Fed. 72, 82; *American Smelting Co. v. Bunker Hill etc. Co.*, 248 Fed. 172, 182). An attachment, on the other hand, forcibly and arbitrarily disturbs existing conditions without reference to the merits of the claim on which it is based. It deprives the defendant of his property during the whole pendency of the suit; it interrupts his business and reflects on his credit; and all this is done on the unsupported say-so of the plaintiff.

Some of the above mentioned distinctions between injunction bonds and attachment bonds were pointed out in *Territory v. Rindscoff*, 4 N. M. 363, 20 Pac. 180, which holds that cases disallowing attorney's fees in suits on injunction bonds are not authority in suits for attorney's fees on attachment bonds. The plaintiff there had sued on an attachment bond, and the court decided that, since the attachment was ostensibly valid, reasonable attorney's fees paid in defending the suit were damages by reason of the attachment. The court said (p. 181):

“In the attachment suit, after the levy of the writ, the custody of the property changes. This remedy is aggressive, and ordinarily more directly injurious and damaging than the defensive process of injunction. In the attachment proceedings, where the writ is levied upon the personal and movable property of the defendant, he is put in a great peril of injury, and a necessity at once arises for prompt action and professional aid to prevent threatened ruin. In a proceeding by injunction, except in a rare case, where the writ is mandatory in character, the possession of the property does not change from the person in possession to the opposite party, or to that of the law, while in the hands of the officer. Again, ordinarily, the writ, if injunction, is sought and obtained only in aid of some equity for relief contained in the bill. While it is true that the attachment writ serves in some measure relatively the same office to a suit at law a writ of injunction does to a suit in equity, both being auxiliary writs, the same reason does not apply with equal force to confer a right to a reimbursement, for the reason above stated.”

We submit that the authorities cited by the trial court do not support its conclusion that attorney's fees paid in respect to the merits of an action cannot, under the circumstances here presented, be recovered upon an attachment bond (Tr. p. 23).

The trial court also stressed the argument that “Attorney's fees as costs or damages are not favored and are recoverable only when with clear support in contract or statute” (Tr. p. 25). We respectfully submit that this argument does not support the court's conclusion. In the first place, we submit, it would necessarily follow from such an argument that attorney's

fees could not be recovered at all upon an attachment bond; yet the trial court expressly pointed out that attorney's fees "paid in respect to the attachments" can be recovered (Tr. p. 23), and that such fees are "damages" covered by the bond. Clearly, therefore, we submit, fees with respect to the merits are likewise covered by the bond, if services on the merits are necessary to vacate the attachment.

In the second place, we submit, the argument under consideration takes for granted the very point in issue. The question is whether the attorney's fees in suit are "with * * * support in * * * statute" (Tr. p. 25) that is, whether they are damages under Section 539 of the Code of Civil Procedure. We contend that they are such damages; that when the California legislature authorized the recovery of "damages by reason of the attachment", it thereby authorized the recovery of the fees in suit. This contention, we submit, is not answered by the fact that the legislative intent might have been more clearly expressed (*United States v. Fisher*, 6 U. S. 2 (Cranch.) 358; *United States v. Healey*, 160 U. S. 136, 148; *Binney v. Chesapeake etc. Canal Co.*, 33 U. S. (8 Pet.) 201). As the Supreme Court said in the case last cited (33 U. S. 212):

"It is not a well-founded objection to this construction of the act, that the most apt and appropriate phraseology to convey this meaning, has not been employed. The great object is, to ascertain the intention of the legislature; and there is certainly nothing in the language used, that is repugnant to the construction we have adopted."

**SECOND: THE FACT THAT THE PLAINTIFF RECOVERED
A JUDGMENT FOR AFFIRMATIVE RELIEF ON ITS
CROSS-DEMANDS AGAINST PORTER DOES NOT IMPAIR
THE LIABILITY OF THE DEFENDANTS ON THE AT-
TACHMENT BONDS.**

The right to recover attorney's fees on an attachment bond is, we believe, clearly not impaired by the fact that the attachment defendant successfully maintained in the attachment suit a counter proceeding for affirmative relief. This was directly held in *Gregory v. United States Fidelity & Guaranty Co.*, 105 Kan. 648, 185 Pac. 35 (supra pp. 23-24).

The facts of the cases at bar, we submit, clearly show that the ruling in the *Gregory* case is sound and reasonable. The circumstance that the plaintiff had valid cross-demands against Porter in no way alters the essential consideration that only a successful defense on the merits could have rid the plaintiff of the attachments. This element, we contend—the necessity of a defense on the merits—under the cases already cited, fixes the defendants' liability for the fees in suit. The fact that the plaintiff not only made good its defense, but also, upon the very transaction asserted by Porter, recovered a half million dollar judgment against him, only emphasizes, we submit, the integrity of the plaintiff's position; it convincingly shows that the attachments should not have been levied in the first place, and that the defendants, in justice, should make good the damages caused by the writs.

The record shows, moreover, that the services which the plaintiff's attorneys rendered in the Porter litiga-

tion would have been the same, even if the plaintiff had had no cross-demands (Tr. pp. 76-77, 87, 105, quoted *supra* pp. 13-14). These services were directed to show that the plaintiff had supplied copra cake in accordance with its agreements. The quality of the cake was the decisive issue, both in Porter's actions against the plaintiff and on the plaintiff's cross-demands. The same evidence and the same services accomplished a double purpose; they overthrew the attachment suits, and at the same time established the plaintiff's claims to affirmative relief. Half the fees which the plaintiff paid its attorneys are, therefore, we contend, plainly chargeable to the defense of the attachment suits, by which defense alone the attachments could have been dissolved. The aggregate recovery prayed in the two cases at bar is half the total fee which the plaintiff paid. The defendants have stipulated that the amounts thus sued for are the reasonable value of the services rendered in *defending* Porter's suits *after* the attachments issued. Clearly, therefore, we submit, since the plaintiff asks only the reasonable value of services in defending against Porter's claims, as distinguished from services in prosecuting its own claims against Porter, the fact that the plaintiff interposed cross-complaints and counter-claims in the Porter suits in no way affects the liability of the defendants.

THIRD: THE FORTHCOMING BONDS WHICH THE PLAINTIFF POSTED WITH THE MARSHAL TO OBTAIN POSSESSION OF THE ATTACHED PROPERTY DID NOT DESTROY OR IMPAIR THE LIABILITY OF THE DEFENDANTS FOR ATTORNEYS' FEES ON THE ATTACHMENT BONDS.

The bonds by which the plaintiff obtained from the marshal the property which Porter had attached (Tr. pp. 93-95, 96-97) were admitted in evidence over the plaintiff's objections and subject to its exceptions (Tr. pp. 92, 95). We contend that the bonds did not impair the liability of the defendants in the slightest, and that the court, therefore, erred in admitting them. Its ruling on this point, we believe, is directly contrary to the decision of this court in *Anvil Gold Mining Co. v. Hoxsie*, 125 Fed. 724. That was an action on an attachment bond posted under the Alaska statute, similar in all substantial respects to the bonds of the defendants in the cases at bar. The defense was that the plaintiff had given a release bond in the attachment suit. The court held that this circumstance was not a defense and that the plaintiff, notwithstanding the release bond, could maintain an action on the attachment bond to recover costs and damages. The court said (p. 728):

"It is the final judgment in the case that is to determine the liability of the obligors upon the attachment undertaking. But the appellees contend that the appellant, the defendant in the attachment suit, having given an undertaking for the release of the attachment under section 150 of the Alaska Code, has waived the right to raise the question whether the attachment was wrongful or without sufficient cause, or, as stated by the court below, the defendant waives all irregularities and defects

in the original attachment proceedings, and admits an estoppel in the attachment suit against the attachment sureties by giving the bail required by the statute. It may be admitted, for the purposes of this case, that when the defendant in an attachment suit under the Alaska Code gives the undertaking provided in section 150, he waives his right to question mere irregularities and defects apparent upon the face of the original attachment proceedings; *but it does not follow that he admits an estoppel as against a judgment in the attachment suit, where the cause of the attachment and the cause of action are the same.* The reason why the defendant in an attachment suit who gives an undertaking for the release of the attachment may be deemed to have waived his right to question the regularity and correctness of the attachment proceedings is because there is no practical method provided for afterwards determining in the progress of that case the question whether there were irregularities or defects in such proceedings or not. *The only issues left to be determined, after the release of the attachment, are those relating to the cause of action; and where, as in this case and under the statute under consideration, these issues are the same as the cause of attachment, they are necessarily determined by the judgment, and all other questions may be deemed to have been waived.* But this waiver extends no further, and there is no implied estoppel beyond that which appears upon the face of the attachment proceedings, and relating to such proceedings, that will deprive the defendant of the right to recover all costs he may have incurred and all damages he may have sustained by reason of the attachment, if it is finally determined that the plaintiff had no cause of action" (italics ours).

This decision, in and of itself, we submit, clearly shows that the bonds given by the plaintiff to the

marshal are not material in the cases at bar. We may add, however, that the plaintiff here is in a much stronger position even than the plaintiff in the *Hoxsie* case. There the plaintiff had posted a bond to *discharge* the attachment, and the trial court thereupon, in accordance with the Alaska statute, had made an order discharging it (125 Fed. 729-731). The undertakings in the cases at bar were not "discharge" bonds; they were "forthcoming" or "redelivery" bonds, given under Section 540 of the California Code of Civil Procedure. In accordance with that section, they were given directly to the marshal (Tr. pp. 91-92) to take the place of the property. The marshal manifestly has no authority to "discharge" an attachment and Section 540 gives him none; it only provides for the *substitution* of a proper undertaking for the property seized under the writ.

The bonds themselves were simply undertakings to redeliver the sequestered property or pay its value should Porter recover judgment (Tr. pp. 94, 97).

We have found no case in California deciding the effect of a forthcoming bond under Section 540 of the Code of Civil Procedure upon the question before the court. The rule is definitely settled, however, under similar statutes, that such a bond does not vacate or discharge the attachment. The bond is simply substituted for the attached property, and the writ of attachment remains in full force and effect.

In the case of *In re Federal Biscuit Co.*, 214 Fed. 221 (C. C. A., 2nd Circuit), decided under the New York

statute, the court said with reference to a forthcoming bond like the bonds in the cases at bar (p. 224):

“It is important to distinguish between the discharge of the lien of the attachment by the bond given to take its place and the vacation of the writ. The two things are quite distinct, and the District Judge apparently did not have his attention called to the distinction, and it was not clearly pointed out in the argument before us.

* * * * *

The discharge of the lien of attachment is one thing, the vacation of the writ is another. The discharge of the lien does not necessarily vacate the writ. See *King v. Block Amusement Co.*, 126 App. Div. 48, 111 N. Y. Supp. 102 (1908), affirmed 193 N. Y. 608, 86 N. E. 1126. The question whether the writ shall be vacated is important as affecting the liability of the surety.”

In *Dewey v. Kavanagh*, 45 Neb. 233, 63 N. W. 396, the court said (63 N. W. 397):

“The execution of the bond provided for by said section 206 was not designed to have, nor did it have, the effect of discharging the attachments. The case and all its proceedings stood precisely as if such bond had not been given. *The only effect of the bond* was to have it take the place of the property” (italics ours).

Other cases to the same effect are:

Smith v. Packard, 98 Fed. 793, 797 (C. C. A., 7th Circuit);

Correy v. Lake, 6 Fed. Cas. No. 3253, p. 599;

Day v. McPhee, 41 Colo. 467, 93 Pac. 670, 674;

Chittenden v. Nichols, 31 Colo. 202, 72 Pac. 53, 54;

Drake v. Sworts, 24 Ore. 198, 33 Pac. 563, 564;

Schunack v. Art Metal Novelty Co., 84 Conn. 331,
80 Atl. 290, 292.

Plainly, we submit, so far as the questions here involved are concerned, the plaintiff was in exactly the same position after giving the release bonds as it was before it had given them. To rid itself of the attachments and of the liability on the bonds which it had assumed, because of the attachments, it had no choice except to pay its attorneys to defend Porter's suits on the merits.

CONCLUSION.

In conclusion, we submit that these are cases in which the plaintiff is justly entitled to the relief sought. The defendants voluntarily assumed the liability which the statute made a condition precedent to the issuance of Porter's writs of attachment. They admit that the amounts sued for are reasonable compensation for the services which the plaintiff's attorneys performed in defending the attachment suits. The evidence shows that, without the services of attorneys in such defense, the attachments could not have been dissolved.

Attachment, at best, is a harsh and arbitrary remedy. The statutory liability of attachment sureties was designed to restrain its use in aid of doubtful claims (*Bing Gee v. Ah Jim*, 7 Fed. 811, 814). The defendants, as professional sureties, were paid to assume this liability.

We respectfully submit that the judgments of the trial court with respect to attorneys' fees should be reversed.

Dated, San Francisco,

May 21, 1924.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff in Error.

ALFRED SUTRO,

EUGENE M. PRINCE,

Of Counsel.

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

JAVA COCOANUT OIL COMPANY, LTD. (a corporation),

Plaintiff in Error,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
(a corporation),

Defendant in Error.

No. 4125

JAVA COCOANUT OIL COMPANY, LTD. (a corporation),

Plaintiff in Error,

vs.

GLOBE INDEMNITY COMPANY (a corporation),

Defendant in Error.

No. 4126

BRIEF FOR DEFENDANTS IN ERROR.

HARTLEY F. PEART,

REDMAN & ALEXANDER,

Attorneys for Defendants in Error.

FILED

1917

F. D. MONTGOMERY



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Defendant in Error.

No. 4126

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Facts.

As set forth in the bill of exceptions, on August 28, 1920, Warren K. Porter commenced an action against plaintiff in error herein

“for the recovery of \$143,566.25, with interest and costs, from the Java Cocoanut Oil Company, Ltd., the plaintiff in the case at bar. On or about September 10, 1920, Java Cocoanut

Oil Company, Ltd., filed an answer to said complaint, together with a counterclaim and cross-complaint praying the recovery from Porter of \$189,431.93 damages, with interest and costs. On or about September 13, 1920, said Java Coconut Oil Company, Ltd., on such counterclaim and cross-complaint caused and procured a writ of attachment to issue out of and over the seal of the above-entitled court, and to be levied upon the property of said Warren R. Porter. On or about December 6, 1920, said Warren R. Porter procured the writ of attachment mentioned in the amended complaint in action number 16,715, one of the cases at bar, to issue out of and over the seal of the above-entitled court against the property of plaintiff, and to be levied upon certain property of plaintiff, on or about December 20, 1920, as appears from the return of the United States marshal, hereinbefore set forth as Plaintiff's Exhibit 1. The attachment bond sued on in said action number 16,715 was given in connection with this attachment. Thereafter and on or about December 24, 1920, said Java Coconut Oil Company, Ltd., posted with the United States marshal the undertaking hereinabove set out at length, and said marshal thereupon released from said attachment all the property levied upon, as likewise appears from said Plaintiff's Exhibit 1. Subsequently and on or about July 12, 1921, said Warren R. Porter filed an amended complaint in said original action number 16,430 setting forth three causes of action against said Java Coconut Oil Company, Ltd., alleging a total damage of \$172,-166.25.

Action number 16,452 was commenced by said Warren R. Porter against said Java Coconut Oil Company, Ltd., on or about October 1, 1920, to recover \$27,500 damages, with interest and costs. Porter claimed an additional \$100,-

000 by an amended cross-complaint and counterclaim filed on or about July 12, 1921. On December 27, 1920, or thereabouts, said Warren R. Porter caused the writ of attachment mentioned in the amended complaint in said action number 16,716, the other of the cases at bar, to issue out of and over the seal of the above-entitled court against the property of Java Cocoanut Oil Company, Ltd., to be levied upon such property as is shown by the return of the United States marshal, hereinbefore set out as Plaintiff's Exhibit 2. The attachment bond sued on in said action number 16,716 was given in connection with this attachment. On December 30, 1920, or thereabouts, said Java Cocoanut Oil Company, Ltd., posted with the United States marshal the undertaking hereinabove set forth at length, and said marshal thereupon released from said attachment all the property levied upon, as likewise appears from said Plaintiff's Exhibit 2.

On or about January 19, 1921, said Java Cocoanut Oil Company, Ltd., in said action number 16,452, filed a cross-complaint and counterclaim, by such cross-complaint and counterclaim praying the recovery from said Warren R. Porter of \$219,374.39 damages, with interest and costs. On or about January 31, 1921, said Java Cocoanut Oil Company, Ltd., in said action number 16,452, caused a certain writ of attachment to issue out of and over the seal of the above-entitled court against the property of said Warren R. Porter. Said writ was levied on certain property of said Warren R. Porter on or about February 2, 1921. On or about June 4, 1921, upon motion of said Warren R. Porter, said writ of attachment was duly quashed, vacated and set aside. On or about March 1, 1921, said Java Cocoanut Oil Company, Ltd., cause an *alias* writ of attachment to issue in said action number 16,452, out

of and over the seal of said court, and to be levied on March 2, 1921, or thereabouts, on certain property of said Warren R. Porter.

Action number 16,498 was commenced by Java Cocoanut Oil Company, Ltd., against said Warren R. Porter on or about January 19, 1921, to recover \$22,342.50 with interest and costs. Action number 16,518 was commenced by said Java Cocoanut Oil Company, Ltd., against said Warren R. Porter on or about February 23, 1921. An amended complaint praying the recovery of \$65,826.68, with interest and costs, was filed on or about October 26, 1921. In both these last mentioned actions Porter filed cross-complaints and amended cross-complaints praying in each case the sum of \$100,000 damages with interest and costs. In action number 16,498 Java Cocoanut Oil Company, Ltd., on or about January 31, 1921, caused the issuance of a writ of attachment out of and over the seal of the above-entitled court, which writ was levied upon certain property of said Warren R. Porter on or about February 2, 1921." (Trans. pp. 109-12.)

It thus appears from the record that jurisdiction over the plaintiff in error in the actions commenced against it by said Porter was not acquired *by means of attachment proceedings*, but that plaintiff in error appeared in said actions and filed answers and cross-complaints therein and on September 13, 1920, *several months before the issuance of the first attachment on behalf of Porter*, itself sued out attachments against him on its cross-complaint in action No. 16,430, and thereafter prosecuted its said cross-complaint successfully to judgment.

It also appears that plaintiff in error, by giving release of attachment bonds secured the release of the attachments which Porter had procured to be levied.

The undertakings on attachment filed by Porter were in the usual form and provided that if the defendants

“recover judgment in said action the said plaintiff will pay all costs that may be awarded to the said defendants or either of them and all damages which they or either of them may sustain by reason of the said attachment.”

The undertakings further provided, as required by law, that

“if the said attachment is discharged on the ground that plaintiff was not entitled thereto under Section 537, Code of Civil Procedure, the plaintiff will pay all damages which the defendant may have sustained by reason of the attachment not exceeding the said sum specified in the undertaking.” (Trans. pp. 8-9.)

Plaintiff in error refused to accept payment of the costs awarded in the several actions instituted by Porter, some of which were incurred before he sued out his attachments, *and \$550.00 of which was a premium paid for an undertaking on attachment filed by plaintiff prior to the issuance of Porter's first attachment*, insisting that in addition to said costs it was entitled to payment of attorneys' fees in the sum of \$25,000.00 incurred by plaintiff in error for services rendered *in the defense of said actions and in the prosecution of said cross-complaints*. The

theory upon which this demand was made was that the services rendered by its attorneys in the preparation and trial of said cases should be regarded as damages sustained "by reason of the attachments" which Porter procured to be levied; and this despite the fact that these attachments were released by the giving of release of attachment undertakings, the premiums upon which (\$721.00) were taxed as part of the costs of plaintiff in error in the said actions and allowed in the cases at bar. The trial court held that this theory was unsound and awarded judgment in favor of plaintiff in error for the amount of its said costs only, aggregating the sum of \$1746.38 in the case of one surety and \$953.70 in the case of the other. (Trans. pp. 20, 156.)

Argument.

I.

JUDGE DIETRICH DID NOT HOLD NOR INTIMATE, ON OVERRULING THE DEMURRERS TO THE AMENDED COMPLAINTS, THAT THE UNDERTAKINGS SUED ON INCLUDED ATTORNEYS' FEES PAID FOR SERVICES RENDERED IN DEFENDING THE ACTIONS AND PROSECUTING THE CROSS-COMPLAINTS.

Plaintiff in error says (Brief, p. 3) that Judge Dietrich on overruling the demurrers to the amended complaints "held in effect that such fees are recoverable". Inspection of Judge Dietrich's opinion, which is in the record (Trans. pp. 13-5), discloses that he not only did not so rule but plainly

indicated that his views were in accord with the views subsequently expressed by Judge Bourquin before whom the cases were tried. In overruling the demurrers Judge Dietrich said:

“The amended complaint is thought to be reasonably clear, and in each cause of action the facts pleaded are sufficient to entitle the plaintiff to relief. By so holding I am not to be understood as foreclosing certain questions discussed by the defendant partly upon the assumption of facts appearing only by remote inference or in the records of the attachment cases. Those questions, it is thought, can be more safely answered when the evidence is in.”

And he significantly remarked that:

“Defendant now argues that under all the circumstances it must be apparent that the services were rendered primarily in defense of the suit, and that the dissolution of the attachment was a mere incident. That may turn out to be true, but such a theory is not in harmony with the allegations of the pleading.”

“The allegations of the pleading”, as Judge Dietrich pointed out, were to the effect that it was necessary for plaintiff in error to employ attorneys “for the purpose of ridding itself of the attachment”.

Now it *did* “turn out to be true” that “the services were rendered primarily in defense of the suit, and that the dissolution of the attachment was a mere incident”. It is plain, we submit, that if the decision of the cases *upon the evidence*—not upon the *complaints*—had been by Judge Dietrich he would have reached the same conclusion reached by Judge Bourquin.

Furthermore it "turned out to be true"—*what did not appear on the face of the complaints*—that it was not necessary to defend the case to get rid of the attachments. The attachments were gotten rid of by the giving of bonds releasing them, the expense of procuring which, as above stated, was included in the costs judgment which was awarded by the trial court in the cases at bar.

Thus the attempt of plaintiff in error to make it appear that Judge Dietrich looked with favor upon its contentions is shown to be baseless.

II.

THE LIEN OF THE ATTACHMENTS WAS RELEASED BY THE GIVING OF THE RELEASE OF ATTACHMENT UNDERTAKINGS, NOT BY DEFENDING THE ACTIONS. THE ONLY DAMAGE SUSTAINED BY PLAINTIFF IN ERROR "BY REASON OF THE ATTACHMENTS" WAS THE COST TO WHICH IT WAS PUT IN SECURING THEIR RELEASE. THE PORTER ACTIONS WERE NOT DEFENDED NOR THE CROSS-COMPLAINTS PROSECUTED FOR ANY SUCH PURPOSE.

Directly in point on this proposition, and supporting the judgments herein, is the case of

State v. Fargo, 52 S. W. 199.

No case in conflict with this authority has been cited by plaintiff in error.

The *Horsie* case, cited by plaintiff in error, (125 Fed. 724) is not in point. No question of attorneys' fees was involved in that case. The court there

merely held—what we do not dispute—that the giving of a release of attachment bond does not discharge the surety from liability for damages sustained by the defendant while the attachment is in force, i. e., until it is released by the giving of a release of attachment bond.

But plaintiff in error says that the release of attachment bond given in this case was a “forthcoming” bond which did not “discharge” the attachment; that this bond was given under Section 540, C. C. P. and not under Sections 554-5 C. C. P. Release of attachment bonds given under Section 540, it is said, do not “discharge” attachments; that such bonds are “simply undertakings to re-deliver the sequestered property or pay its value” should plaintiff recover judgment. (Brief, p. 41.)

But the fact is that it is not Section 540 but Section 555 which provides for a “re-delivery” bond (or for payment of the value of the attached property). The bond given under Section 540 provides for the payment of plaintiff’s “demand” (or the value of the attached property) and of course it makes no difference whether the release of attachment bond is given under the one section or the other. In either case the bond operates to discharge *the lien of the attachment*. If it did not it would be idle to give it.

Plaintiff in error says that “the marshal manifestly had no authority to ‘discharge’ an attachment and Section 540 gives him none”. Of course this

is not so. Section 540 does give the marshal authority to "discharge" the attachment, i. e., *to release the attached property from the lien of the attachment*, and the marshal in fact did so. (See his returns, Trans. pp. 35-69.) Whether a release bond is given under the one section or the other the effect *is precisely the same*—the lien of the attachment is discharged; the property attached is thereby released from attachment.

In this case the terms of the release bonds which plaintiff in error gave to the marshal are not in conformity with the provisions of Section 540, but are in conformity with the provisions of Section 555. But they were sufficient under either section and discharged the attachments.

Counsel say (Brief p. 41) that "the undertakings in the case at bar were not 'discharge' bonds". What are "discharge" bonds? Bonds given under the provisions of Sections 554-5? Obviously bonds given under said sections no more operate to *vacate the writ of attachment* than bonds given under Section 540. The effect of both bonds is the same—they operate *to release the lien of attachment* if, as in these cases, the property has already been attached. The bond prescribed by Section 540 also operates to *prevent* an attachment which the marshal or sheriff would otherwise be obliged to levy. Bonds given under said section are not "re-delivery" bonds as counsel for plaintiff in error denominate them. It is not provided in said section that such bonds shall contain

a provision regarding "re-delivery". Such a bond is proper *where no property has been attached to "re-deliver"*. It is the bond given under Sections 554-5 that provides for "re-delivery". The bond given by plaintiff in error to the marshal was not to *prevent* an attachment, as provided by Section 540. It recites that attachments *had been levied*. The bond is drawn pursuant to the provisions not of Section 540 but of Sections 554-5. But of course, as we have pointed out, the effect of both bonds is the same—they both operate to release the lien of the attachments leaving the plaintiff in the action liable only for such damages as the defendant should sustain "by reason of the attachment" if judgment should go in defendant's favor.

On page 41 of their brief counsel for plaintiff in error say:

"We have found no case in California deciding the effect of a forthcoming bond under Section 540 of the Code of Civil Procedure upon the question before the court. The rule is definitely settled, however, under similar statutes that such a bond does not vacate or discharge the attachment."

They then quote from *In re Federal Biscuit Co.*, 214 Fed. 221, where the court points out the distinction "between the discharge of the lien of the attachment by a bond to take its place, and the vacation of the writ". The court says that "the discharge of the lien of attachment is one thing, the vacation of the writ is another". Of course this is true. We do not dispute it. But it has nothing to

do with the point under consideration. If the writ had been improperly issued and had been attacked on motion and had been vacated, the surety would be liable under the terms of its bond. Defendants in error are certainly not insisting that the writ was *improperly issued* and for that reason vacated thereby rendering them liable under the terms of their undertakings. Our position is that the *lien of the attachments* was released—and that plaintiff in error therefore was damaged by the attachments only to the extent of the expense incurred by it in securing their release. And this position is sustained by *State v. Fargo*, supra. Defendants are liable (for costs) not because *the writ* was vacated—it was *not* vacated—but because defendant *recovered judgment in the action*. The recovery by plaintiff in error in the cases at bar is by virtue of the *first clause* of the undertakings, not by virtue of the *second clause*, which relates to the *vacation of the writ* arising from the fact that “plaintiff **was** not entitled thereto under Section 537, Code of Civil Procedure”. (Trans. pp. 8-9.) Counsel are putting defendants in error in the position of contending that the writ of attachment was vacated, which of course would only be so if it had been *improperly issued*—which is not the case—when in fact we are contending that *the property attached was released from attachment* and hence that the only damage shown to have resulted from the attachments was the expense of securing their re-

lease, for which the court awarded plaintiff in error judgment.

Counsel's statement that "the marshal manifestly has no authority to 'discharge' an attachment, and Section 540 gives him none", is in the teeth of the decision of the Supreme Court of California in

Maskey v. Lackmann, 146 Cal. 777,

where the court said:

"On June 20, 1895, the sheriff accepted an undertaking for the release of the attachment, given in pursuance of Section 540 of the Code of Civil Procedure, and released the attachment, and on June 21, 1895, in consideration of the undertaking, he officially executed a release, which was duly recorded in the office of the recorder."

It makes no difference whether the release of attachment undertaking is given under Section 540 or Section 555. In either case the attachment is "discharged".

Rosenthal v. Perkins, 123 Cal. 240.

An attachment is not "discharged" by the trial of the action and rendition of a judgment for defendant *where a release of attachment bond has been given*. In such case the attachment is released by the giving of the release of attachment bond in compliance with the provisions of either Section 540 or Sections 554-5, which enable the defendant to secure a release of the attachment *prior to the trial of the action*. It is only where the attach-

ment is *not* released under said sections that a judgment for defendant operates to release it.

C. C. P., Section 553.

It is of course true, as plaintiff in error says, that the release of attachment undertaking is substituted for the attached property, but it does not follow *that the attachment remains in force after the undertaking is given*. Plaintiff in error does not actually assert that it is, but what it does say is calculated to create the impression that such is the case. It says that "the writ of attachment remains in full force and effect". But what difference does it make that the "writ of attachment" is in force if the *property* on which the levy was made has been released from attachment? Would the surety be liable if a writ had been issued but not levied? In such case the *writ* would be "in full force and effect". In the case at bar the writ was returned—as it had to be within twenty days after its receipt by the marshal (C. C. P., Section 559)—and upon its return it ceased to remain "in full force and effect" or any force or effect. It was *functus officio*. The *property* which had been released by the giving of the release of attachment undertakings was no more subject to be applied to the satisfaction of any judgment that plaintiff might obtain than if no writ of attachment had ever been issued. Of course if after the execution of the release of an attachment undertaking *a motion is made to vacate the writ* upon the ground that it was "improperly or irregularly issued" and

the motion should be granted, the surety would be liable for attorney's fees *incurred on such motion*, as was pointed out in the *Federal Biscuit Co.*, case *supra*, cited by plaintiff in error. But this proposition has no bearing whatever upon the point here under consideration. In the case supposed, the liability of the surety arises under the *second engagement* of its undertaking. (Trans. p. 9, lines 5-11.) Section 556, C. C. P., expressly provides that such a motion may be made "after the release of the attached property". No such motion was made in this case and no such liability was incurred by the defendants in error under this provision of their undertakings. The writ of attachment was not "improperly or irregularly issued", as is conceded, and it was not discharged upon any such ground.

Counsel for plaintiff in error have neither understood nor properly applied the cases cited in their brief.

On page 43 of its brief plaintiff in error says:

"Plainly, we submit, so far as the questions here involved are concerned, the plaintiff was in exactly the same position after giving the release bonds as it was before it had given them. To rid itself of the attachments and of the liability on the bonds which it had assumed, because of the attachments, it had no choice except to pay its attorneys to defend Porter's suits on the merits."

Of course this is not so. If the release of attachment bond had been given and plaintiff in error had (as might have been the case) sustained dam-

age "by reason of the attachments", it would be entitled to recover such damage in an action on the attachment undertaking. But as no damage was sustained "by reason of the attachments" plaintiff in error is "in exactly the same position" *as if the attachment had not been levied*. It would not have had "to pay its attorneys to defend Porter's suits on the merits" "to rid itself of the attachments", because there would be no "attachments" to "rid itself of".

It is true of course that by successfully defending the suits plaintiff in error would "rid itself of" "the liability on the bonds which it had assumed". But the release of attachment bond imposed no *new liability* on plaintiff in error. It served merely to *secure* the payment of any *judgment* which Porter might recover. The release of attachment bond imposed the *same liability* which such *judgment* would have imposed. Presumably if Porter had recovered judgment plaintiff in error would have paid it. Payment of the *judgment* would have *ipso facto* discharged any liability under the release of attachment bond. Plaintiff in error will not be heard to say that if it had not given the bond and Porter had recovered judgment it would have *evaded payment of the judgment*. Yet this is in effect precisely what it is here asserting. It might as well argue that if a writ of attachment were issued, *but not levied*, it could recover damages on the attachment undertaking because in order "to get rid of" *the writ of attachment* which had been

regularly issued it was necessary "to pay its attorneys to defend Porter's suits on the merits". There is as much logic in the one contention as there is in the other. Plaintiff in error did not lift a finger "to get rid of the liability" under the release of attachment bond. When it defeated Porter's suits and recovered judgment against him the liability under the release of attachment bonds fell of its own weight. The services rendered by the attorneys for plaintiff in error were precisely the same as if the attachments *had been released without the giving of the release of attachment bonds.*

Thus under analysis the entire argument of plaintiff in error on this point collapses like a card house. It is wholly and utterly fallacious. These considerations require an affirmance of the judgment.

We will, however, answer the argument of plaintiff in error based upon the erroneous assumption that the attachments were released not by the release of attachment undertakings, but by the judgment in favor of defendant. Postulating that it was so released the argument which plaintiff in error advances in support of its position is equally untenable.

III.

NO PART OF THE FEES PAID TO ITS ATTORNEYS BY PLAINTIFF IN ERROR FOR SERVICES IN DEFENDING THE CASES OR PROSECUTING THE CROSS-COMPLAINTS ARE CHARGEABLE AGAINST THE ATTACHMENT UNDERTAKINGS.

We do not deny that some of the authorities cited by plaintiff in error hold that where the attachment is released by a judgment in favor of defendant on the merits, attorneys' fees paid for defending the action (or part thereof) should be regarded as damages sustained by the defendant "by reason of the attachment". But there are well considered authorities to the contrary, and we shall show that the reasoning indulged in by the courts in the cases relied on by plaintiff in error is clearly erroneous.

In these decisions—see *Crom v. Henderson*, 175 N. W. 983, cited by plaintiff in error (an Iowa case in which state the decisions of the Supreme Court are conflicting)—it is said that "the fact that the same proof operates both to defend against the suit and to prove that the attachment was wrongfully sued out does not militate against the right of the plaintiff to recover attorneys' fees for defending against the attachment." Let us examine this contention. What is meant by "defending against the attachment"? In the case at bar, for example, what services were rendered by the attorneys for plaintiff in error and what fees were paid to them "for defending against the attachment"? What did the attorneys for plaintiff in error do in the cases at bar, which they would not

have done had the attachments not been issued? Obviously *nothing*. No claim is made that they did. They did not appear in the case because of the attachments. The attachments were not levied until several months after the suits were commenced. In the meantime plaintiff in error appeared in the cases, filed answers and cross-complaints therein *and itself sued out writs of attachment against Porter*. Certainly up to that point of time nothing whatever was done by plaintiff in error or its attorneys in "defending against the attachments". There were none to be defended against, nor was anything thereafter done in the way of "defending against the attachments" by the attorneys for plaintiff in error, save such services as possibly they may have rendered in procuring and filing the release of attachment undertakings. It does not even appear that they did this. It may have been done at the request of plaintiff in error by the American Surety Company, which gave the bonds and charged the sum of \$721.00 for so doing, for which amount plaintiff in error has been awarded judgment.

In no case relied on by plaintiff in error *has any explanation been given of what is meant by "defending against the attachment"*. It may be claimed that where a foreign defendant is brought into court *by means of an attachment* and thus compelled to litigate in a foreign jurisdiction, upon a showing that except for the attachment *it would not have appeared at all*, a case would be presented where damages had been sustained "by reason of

the attachment". It may plausibly be argued in such a case that the attorneys' fees paid for defending the case would not have been incurred but for the attachment and hence that they are recoverable in an action on the attachment undertaking. Some of the authorities cited are to this effect. But no such situation is here presented. On the contrary it is obvious that Porter's suits were commenced in anticipation of actions against him and that he decided to strike the first blow. It is apparent that if he had not sued *he would have been sued*. If he had not brought the defendant into court the defendant would assuredly have brought him into court. This is demonstrated by the cross-complaints filed and the recovery of judgments on them against him.

But even in a case where no cross-complaint is filed, it cannot be assumed that the action would not be defended except for the attachment. It must be assumed that a defense would be offered, attachment or no attachment, and that attorneys would be employed to defend. In such case there is no defense "against the attachment". The defense is against *the claim asserted in the complaint*. The attachment proceeding is taken merely to *secure the payment of such claim*. If the claim is defeated the attachment falls. It does not fall *because of any attack made on it*. It falls because the claim on which it rests falls. This is so entirely clear and obvious that it seems almost incredible that the subject should be in the state of confusion in which

the decisions of the courts have left it. In the cases relied on by plaintiff in error, the courts seemed possessed of the notion that attorneys in attachment cases render some service *in defeating the attachment*, whereas the service rendered by them is in defeating the *claims* sued on. The attachment of course is worthless if the claim sued on is without merit. If the claim have merit then the law requires the defendant to pay the judgment against him *whether or not the claim is secured by attachment*. Attorneys' fees are only collectible in a case where, *regardless of the merits of the claim sued on*, a writ of attachment has been "irregularly or improperly issued and for that reason has been discharged". (C. C. P., Section 556.) In such case recovery may be had on the attachment bond regardless of the merits of the claim set up in the complaint. In such case, and in such case only, are attorneys' fees recoverable. They are recoverable because in such case the attachment is defeated by means of *the motion prescribed by Sections 556-8, C. C. P.* Such a motion *is presented by an attorney* and if it be granted, the defendant has been damaged "by reason of the attachment" to the extent of the expense to which he was put in having it discharged.

These considerations, we submit, are an absolute and complete answer to everything advanced in the cases upon which plaintiff in error relies. Such cases, we submit, do not correctly declare the law and should not be followed. They are not control-

ling authority in this court and are, moreover, repugnant to sound reason and sound sense.

The views for which we contend are sustained by the decision of the Supreme Court of Utah in the late case of *St. Joseph's Stock Yards Co. v. Love*, 195 Pac. 305, cited by Judge Bourquin in his opinion in the cases at bar. The court there reviews the conflicting authorities upon the question and reaches the conclusion that attorneys' fees are not recoverable.

Upon the trial it was admitted that in billing their clients for services rendered, the attorneys for plaintiff in error did not "allocate" any charge for "defending against the attachment". (Trans. pp. 99, 104-5.) But they say in their brief (p. 16) that they "allocated" \$25,000 to such service *in their amended complaints herein*. But as the *alleged* "allocation" is not sustained by but is directly contrary to the *evidence*, it can hardly be regarded as warranting the reversal of the judgments based on the *evidence*. If such "allocation" had actually been made by counsel for plaintiff in error it could not have been justified because *nothing whatever* was done by them in "defending against the attachment". Had they at that time the intention of suing on the attachment undertakings to recover attorneys' fees they could of course have so "allocated" their charges, not because such "allocation" was proper but with a view to supporting the claim subsequently asserted that plaintiff in error was damaged "by reason of the attachments" to the

extent of \$25,000. But even if they had in mind at that time the making of the claims thereafter asserted, we do not believe that they would have made such an "allocation". Their sense of humor at any rate would not have permitted such an "allocation". The situation appears to us to be more presentable as it is. It is certainly not so ludicrous.

Plaintiff in error says that the opinion of the Supreme Court of California in *Elder v. Kutner*, 99 Cal. 490, contains a "plain intimation" that attorneys' fees are recoverable. (Brief, p. 22.) We find no such "intimation". On the contrary in deciding the case upon another ground the court refers to the *alleged* right as a "supposed" right which does not seem to us to be a "plain" or any "intimation" that such claim was well founded. Nor can any case decided by the Supreme Court of California be cited which decides or even intimates such a thing. If the "supposed" right really exists it is remarkable that it was not discovered until after the lapse of seventy-two years of litigation relating to the obligations of sureties under attachment undertakings.

Counsel "intimate" in their brief (p. 43) that the obligations of "professional" sureties are not measured by the *terms of their contracts*, as in the case of other sureties; and further advise the court that defendants in error "were paid to assume this liability". Of course if they assumed it, it is immaterial whether they were "paid" to assume it or not. The question at issue is, did they assume it?

—and we have endeavored, we hope successfully, to demonstrate that they did not.

It has become the fashion of late in some quarters to argue that the contracts of “professional” sureties (whose entrance into the judicial bonding business has immensely improved the deplorable pre-existing conditions as all know who know the facts) are subject to any construction, however far-fetched, which will render them liable because they were “paid to assume this liability”, but we did not suppose that any one would presume that such an “argument” would make a favorable impression upon this court.

Counsel for plaintiff in error say in their brief (p. 3) that defendants in error “expressly concede that as to the costs plaintiffs were entitled to recover”. Such is not the fact, which is (as the record shows) that they disputed the proposition that the \$550.00 paid by plaintiff in error for an undertaking *supporting its own attachments issued prior to Porter’s attachments* was a part of the “costs” referred to in the undertakings sued on. Certainly, we submit, it is not within the spirit of such undertakings and we do not think that it is within the letter. It seems to us preposterous that it should have been intended that an undertaking covering “costs” and “damages” “by reason of the attachment” should include “costs” *incurred in the action by the defendant in the prosecution of his own attachments levied before plaintiff attached*. The undertakings in our opinion were not intended

to relate to such "costs". The judgments are, we think, excessive to this extent, but as no appeal was taken from them by the defendants, the question is not before the court. In executing these attachment bonds defendants in error did not suppose, and had no reason to suppose, that they involved the payment of large costs (over \$2600.00) incurred by plaintiff in error in the prosecution of its cross-complaints and attachments in support thereof.

But it would require much more than a "little generosity" to meet plaintiff's "demands in full", which include the un-"allocated" sum of \$25,000 attorneys' fees paid for recovering judgment against Porter on its cross-complaints, the determination of the issues thereby raised *being conclusive with respect to the issues raised by the answers to Porter's complaints.* (Trans. p. 105.) This was entirely too large a draft on the "generosity" of defendants in error, and would be so regarded, we think, by even an un-"professional" and un-"paid" surety.

IV.

THE JUDGMENTS SHOULD BE AFFIRMED BECAUSE OF THE FAILURE OF PLAINTIFF IN ERROR TO MOVE AT THE CLOSE OF THE TRIAL (SEE TRANS. pp. 102-3) FOR A FINDING OR JUDGMENT IN ITS FAVOR, OR FOR SPECIAL FINDINGS OF THE FACTS ESTABLISHED. IN THE ABSENCE OF SUCH A MOTION THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE JUDGMENTS CANNOT BE REVIEWED BY THIS COURT.

To this effect see

Martinton v. Fairbanks, 112 U. S. 670;

Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782;

Tiernan v. Chicago etc. Co., 214 Id. 238;

Phoenix Securities Co. v. Dittmar, 224 Id. 892.

It is respectfully submitted that the judgments should be affirmed.

Dated, San Francisco,

June 7, 1924.

HARTLEY F. PEART,

REDMAN & ALEXANDER,

Attorneys for Defendants in Error.

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

JAVA COCOANUT OIL COMPANY, LTD. (a corporation),

Plaintiff in Error,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
(a corporation),

Defendant in Error.

No. 4125

JAVA COCOANUT OIL COMPANY, LTD. (a corporation),

Plaintiff in Error,

vs.

GLOBE INDEMNITY COMPANY (a corporation),

Defendant in Error.

No. 4126

REPLY BRIEF FOR PLAINTIFF IN ERROR.

PILLSBURY, MADISON & SUTRO,
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ALFRED SUTRO,
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FILED

JUN 12 1924

F. D. MONKTON,
CLERK



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No. 4126

REPLY BRIEF FOR PLAINTIFF IN ERROR.

PRELIMINARY STATEMENT.

Defendants in their brief make four points: *First*, that Judge Dietrich's ruling on the demurrers does not support the plaintiff's claim for attorneys' fees, despite the fact that he held the amended complaints sufficient, and that the allegations of these complaints were established without dispute; *second*, that any liability which

there may have been was removed by the release bonds which plaintiff posted with the marshal, relying for this contention upon a Missouri case squarely contrary to a decision of this court; *third*, that no part of the fees in question is, in any event, chargeable against the attachment undertakings, although defendants, in effect, admit that this claim is against the great weight of authority. Finally, they contend that the case is not open to review because plaintiff made no motion for judgment in the trial court. A sufficient answer to this contention is, we think, that every point of law argued in this court by plaintiff was raised, as will be shown, by the trial court's rulings on evidence, to which plaintiff reserved proper and timely exceptions.

ARGUMENT.

FIRST: JUDGE DIETRICH HELD THAT THE AMENDED COMPLAINTS STATED SUFFICIENT FACTS TO ENTITLE PLAINTIFF TO RELIEF, AND THE ALLEGATIONS OF THE AMENDED COMPLAINTS WERE EITHER ADMITTED OR ESTABLISHED BY UNCONTRADICTED EVIDENCE.

The amended complaints clearly showed that the amounts which plaintiff sought to recover were fees paid for defending Porter's suits on the merits (Tr. pp. 5-6; 143-144). It was on this very point, indeed, that defendants based their demurrers (Tr. pp. 10, 147).

When, therefore, Judge Dietrich held that "the facts pleaded are sufficient to entitle the plaintiff to relief" (Tr. p. 14), his decision manifestly was a definite ruling that attorneys' fees expended in defeating a

claim on its merits are recoverable damages on an attachment bond, where a defense of the case is necessary to dissolve the attachment. The necessity of such defense in the cases at bar plaintiff proved by showing that each attachment was regular on its face, and that neither could have been dissolved except by defeating Porter on the merits (Tr. pp. 67-69). Defendants stipulated that the amounts prayed were the reasonable value of the services of plaintiff's attorneys *after* the levy of Porter's attachments in *defending* his actions against plaintiff (Tr. pp. 32-35). Every other allegation of the amended complaints was established by undisputed evidence.

It is true, Judge Dietrich said, that the decision on the demurrers was not to foreclose "certain questions discussed by the defendant(s) partly upon the assumption of facts appearing only by remote inference or in the records of the attachment cases" (Defs. Br. p. 7, Tr. p. 14). This reference, we think, was to the release bonds (Tr. pp. 93-95, 96-97). Defendants had argued on the demurrers, as they argue here (Defs. Br. pp. 8-17) that the bonds which plaintiff gave to re-obtain possession of the attached property, destroyed the liability of defendants as sureties. This defense did not appear from the face of the amended complaints, and could not, therefore, have been properly considered on the demurrers. It was this defense, quite obviously we think, which Judge Dietrich did not wish to "foreclose".

The claim that the dissolution of the attachments turned out to be a "mere incident" of the defense of

the actions in which the writs issued (Defs. Br. p. 7) is, we think, beside the point. The entire defense in those actions was to establish that the actions had no just foundation, and that the attachments, despite their apparent regularity, should never have been issued.

So far as Judge Dietrich's ruling is concerned, the situation, we submit, is this—that every fact alleged in the amended complaints was established at the trial. The further circumstance, also developed at the trial, that redelivery bonds were given, we submit, did not affect the liability of defendants in the slightest (See Pl. Br. pp. 39-43). Manifestly, under the law as stated in Judge Dietrich's decision on the demurrers, plaintiff was entitled to judgment.

SECOND: THE FORTHCOMING OR REDELIVERY BONDS WHICH PLAINTIFF POSTED WITH THE MARSHAL TO OBTAIN POSSESSION OF THE ATTACHED PROPERTY DID NOT DESTROY OR IMPAIR THE LIABILITY OF DEFENDANTS FOR ATTORNEYS' FEES.

Defendants argue that the attachments were released by the release of attachment undertakings (Tr. pp. 93, 95, 96, 97), and that plaintiff, therefore, sustained no damage by reason of the attachments, except the cost of the release bonds. This argument rests upon the assumption either that the release bonds discharged the attachments and vacated the writs, or else upon the theory that, inasmuch as plaintiff reobtained possession of its property, it makes no difference whether the writs were released or not.

In support of their contention defendants rely upon *State v. Fargo*, 151 Mo. 280, 52 S. W. 199. In that case the court pointed out that the effect of the pertinent Missouri statute was “*to dissolve the attachment, and to vacate all proceedings touching the property and effects attached and the garnishees summoned*” (52 S. W. 201). The court distinguished prior Missouri decisions, which had held that attorneys’ fees were recoverable damages, on the ground that (52 S. W. 202):

“The effect of the execution of the bond to dissolve the attachment was, as we have said, to at once vacate the attachment and all proceedings thereunder.”

In other words, the express point of the *Fargo* case was that, where an undertaking has been given “to dissolve the attachment, and to vacate all proceedings touching the property and effects attached”, attorneys’ fees for services on the merits cannot be recovered as damages on the attachment bond.

Passing for the moment the point that the bonds in the cases at bar did not “dissolve the attachment” or “vacate all proceedings touching the property and effects attached”, we submit that the *Fargo* case is directly contrary to the decision of this court in *Anvil Gold Mining Co. v. Hoxsie*, 125 Fed. 724 (Pl. Br. pp. 39-41), and is not law in this circuit. The *Hoxsie* case specifically held that, despite the giving of a *discharge* bond, a bond like that given in the *Fargo* case, the attachment defendant, if he prevails on the merits, can maintain an action on the attachment bond to recover his costs and damages.

Defendants contend that the *Horsie* case is not in point, because, they say, "No question of attorneys' fees was involved in that case" (Defs. Br. p. 8). This contention, we submit, merely begs the question. The *Horsie* case holds that the attachment defendant, despite the discharge bond, can recover his costs and damages from the attachment surety. Clearly, therefore, if attorneys' fees for services touching the merits are, as we contend, damages by reason of the attachment, they can be recovered.

We pointed out in our opening brief (pp. 41-43), however, that the release bonds in the cases at bar did not discharge the attachments, and that plaintiff here, is in a much better position even than the successful plaintiff in the *Horsie* case.

In our opening brief (p. 41) we inadvertently referred to Section 540 of the Code of Civil Procedure as the section under which the forthcoming bonds were given. As a matter of fact, however, these bonds were given under Section 555 of the Code of Civil Procedure. The bonds comply with the requirements of that section and are not conditioned, as provided in Section 540. It is true that no order for the release of the attachments was made, as provided in Section 554 of the Code of Civil Procedure, but this omission, we submit, clearly in no way affects the questions involved in this case. The fact is that the bonds were forthcoming bonds (Tr. pp. 93-97), given after the attachments were levied and were not preventative bonds to stop the levying of the attachments, as contemplated by Section 540. That the giving of a forthcoming bond *to release*

attached property does not *dissolve* the attachment, as defendants would have it appear, is manifest from a consideration of the provisions of Section 556 of the Code of Civil Procedure. It is there provided that a defendant may, *after the release of the attached property*, on motion, apply to have the writ of attachment discharged. We quote the section in full:

“The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.”

It is obvious, we submit, that if the contention of defendants, that the release of the attachment is the equivalent of its discharge or dissolution, were sound, then the provisions of Section 556 would be meaningless. On the other hand, we contend that Section 556, by providing that an attachment may be discharged after it has been released, clearly points the distinction between the mere release of an attachment and its entire discharge. With the discharge of an attachment the whole proceeding falls, while with its mere release, although the lien of the attachment ceases as to any specific property attached, the writ of attachment remains in full force and effect and operates to hold the sureties on the release bond to the liability assumed in lieu of the property attached. In these cases there was at no time any order discharging the attachments,

and the same, and the liability of the sureties on the forthcoming or redelivery or release of attachment bonds, whatever they may be called, continued until judgment on the merits was entered in favor of plaintiff.

**THIRD: THE ATTORNEYS' FEES PAID BY PLAINTIFF IN
DEFENDING PORTER'S ACTIONS ON THE MERITS ARE
DAMAGES, FOR WHICH DEFENDANTS ARE LIABLE.**

Defendants make no effort whatever to distinguish or impeach the cases cited in our opening brief that attorneys' fees expended by a defendant in defeating an action can be recovered as damages from the surety on the attachment bond of the attachment plaintiff, if the attachment was regular on its face and could not have been dissolved except by successfully defending the case on its merits (Pl. Br. pp. 20-29). The only case which defendants cite is *St. Joseph Stock Yards Co. v. Love*, 57 Utah 450, 195 Pac. 305 (Defs'. Br. p. 22). That case, for the reasons given in our opening brief (pp. 29-32), we submit, is not a sound precedent.

Defendants claim that plaintiff's attorneys appeared in the Porter cases and prepared answers and cross-complaints before Porter's attachments were levied (Defs. Br. p. 19). This statement is, we think, answered by the stipulation of defendants that the amounts prayed were the reasonable value of the services of plaintiff's attorneys in defending the Porter cases, after Porter's attachments were levied (Tr. pp. 32-34; Pl. Br. pp. 16-17). Any services before the attachments are clearly not material.

The argument (Defs. Br. p. 19) that plaintiff's attorneys would probably have rendered the same services had there been no attachments, is similar to the argument made by the defendants in practically all of the cases cited in our opening brief (pp. 25-29). In each of those cases such argument was held untenable. The cases hold that where the action has been defeated, there was no right to sue out the attachment, and that the services attributable to the defense of the suit on its merits cannot, in the very nature of things, be segregated from those necessary to discharge the attachment. The same services operate to defeat the suit and to discharge the attachment, and for that reason it is held the attorneys' fees are recoverable under the attachment bond.

The principle of the cases cited is particularly applicable under the California statute. Section 539 of the Code of Civil Procedure, under which the attachment bonds in the cases at bar were posted, fixes two liabilities upon the surety. The conditions of the bonds were in accordance with that section (Tr. pp. 8-9, 145-146):

1. "if the said Defendants or either of them recover judgment in said action, said Plaintiff will pay all costs that may be awarded to the said Defendants or either of them and all damages which they or either of them may sustain by reason of the said attachment".

2. "if the said attachment is discharged on the ground that Plaintiff was not entitled thereto under section five hundred and thirty-seven, Code of Civil Procedure, the Plaintiff will pay all damages

which the defendant may have sustained by reason of the attachment”.

In both contingencies the liability of the surety for damages is the same and is expressed in identical language. If, therefore, damages by reason of the attachment include attorneys’ fees in the one case, they necessarily include them in the other, under the well settled rule that the same word used in different parts of the same statute will be given the same meaning in each instance (*Babbitts’ Case*, 16 Ct. Cl. 212; *United States v. Hill*, 123 U. S. 681, 686). In the cases at bar defendants specifically admit that if the attachments had been dissolved by motions, or other direct proceedings to that end, then plaintiff could have recovered the fees of its attorneys for services in the dissolution proceedings. Defendants say (Defs. Br. pp. 14-15):

“Of course if after the execution of the release of an attachment undertaking *a motion is made to vacate the writ* upon the ground that it was ‘improperly or irregularly issued’ and the motion should be granted, the surety would be liable for attorney’s fees *incurred on such motion*, as was pointed out in the *Federal Biscuit Co. case supra*, cited by plaintiff in error.”

In other words, by defendants’ own admission, the words in the bonds “damages * * * by reason of the attachment” include attorneys’ fees, if the attachment is discharged on motion. Manifestly, therefore, we submit, the provision that “if the defendant recovers judgment”, then the surety is liable for “damages * * * by reason of the attachment,” likewise includes attor-

neys' fees. Since a defendant obviously cannot "recover judgment" without the services of an attorney, such fees must be for the services rendered in defending the suit on its merits.

FOURTH: THE POINTS OF LAW ARGUED BY THE PLAINTIFF ON THESE WRITS OF ERROR WERE RESERVED BY PROPER EXCEPTIONS IN THE TRIAL COURT.

Defendants' last point is that the fact that plaintiff made no motions for judgments in the court below prevents this court from reviewing the sufficiency of the evidence, and therefore, that the judgments should be affirmed. This contention, we submit, is without merit. A motion for judgment, so far as the question here under consideration is concerned, is only necessary to obtain a ruling on a question of law, to which an exception can be reserved. Where the court rules on the question of law during the trial and exception is taken to its ruling, then a motion for judgment or exception following such motion is obviously unnecessary.

Plaintiff contends that the trial court erred in two rulings of law, first, in holding that attorneys' fees for services touching the merits of a case cannot be recovered as damages on an attachment bond where the attachment could not have been dissolved except by a successful defense of the merits; second, in ruling that the forthcoming bonds which plaintiff gave the marshal destroyed the liability of defendants. On both these questions the trial court ruled adversely to plaintiff in passing upon the evidence, and plaintiff reserved timely and proper exceptions.

The question as to the liability of defendants for attorneys' fees touching the merits of Porter's suits arose during the trial, when defendants offered in evidence the record in the Porter suits. To this offer plaintiff objected (Tr. p. 106). The trial court admitted the evidence (see Tr. p. 106), and plaintiff reserved an exception (Tr. p. 107). In amplification of the objection and exception plaintiff's counsel said (Tr. pp. 107-108):

"MR. SUTRO. Might I say to your Honor at this point, which your Honor stated, about the allocation of the fees, just to call your Honor's attention, in connection with our objection, to the stipulation that they have made, that \$15,000 in one case and \$10,000 in another case were reasonable charges.

THE COURT. For the whole case?

MR. SUTRO. No, that is just the point that I want to bring to your Honor's mind. 'It is stipulated that the sum of \$10,000 is the reasonable value of the services rendered subsequent to the 27th day of December, 1920, by Messrs Pillsbury, Madison & Sutro, as attorneys for plaintiff in defending the original action No. 16,452,' and the stipulation is the same in the other case. In other words, that that is the reasonable charge after attachment was levied in each case. *Now, it narrows itself down to the one point, are we entitled to that fee paid for these services for defending this suit and ridding the plaintiff of the attachment in each case?*

* * * * *

THE COURT. I understand."

The point, in other words, was that plaintiff was entitled to recover the fees it had paid its attorneys for services touching the merits; that the amount and reasonable character of these fees was not in dispute, and therefore, that the proffered evidence was incompetent

and immaterial. The court's adverse ruling on these points is fully covered by plaintiff's exception (Tr. pp. 106-107).

The question whether or not defendants are liable for attorneys' fees touching the merits of the Porter suits is also preserved by plaintiff's exceptions to the court's ruling admitting the release bonds in evidence (Tr. pp. 92-95). For reasons given in this brief and in our opening brief, we submit that the bonds were immaterial and should not have been admitted. The manifest error in this regard, we submit, in and of itself, requires a reversal of the judgments, unless this court should hold that the fees sued for were not recoverable in any event. The rulings on the bonds, consequently, again raise the question of defendants' liability for the attorneys' fees, with which these writs of error are primarily concerned.

The error, as such, in admitting the release bonds is, of course, directly presented by plaintiff's exceptions (Tr. pp. 92-95).

It is a statutory rule that erroneous rulings on evidence, to which proper exceptions have been reserved, can be reviewed regardless of whether the record contains special findings of fact or whether the record contains special findings of fact or whether the unsuccessful party made a motion for judgment (Rev. Stats., Sec. 700, 6 Fed. Stats. Ann. 205, Comp. Stats., Sec. 1668; *Tyng v. Grinnell*, 92 U. S. 467, 469; *Grayson v. Lynch*, 163 U. S. 468, 473; *Oakland Water Front Co. v. Leroy*, 282 Fed. 385 (C. C. A., 9th Circuit)).

Even independently of the foregoing considerations, we submit, this court's right to review the cases is not precluded by the absence of motions for judgment. Under the decision of the Supreme Court in *Coler v. Cleburne*, 131 U. S. 162, a bill of exceptions in the form of the bill of exceptions in the cases at bar is sufficient as a special finding of facts. In the case cited the Supreme Court said (p. 163):

“There is no special finding of facts, but there is a bill of exceptions, which, after setting forth what was proved, states, that the court, on the pleadings and proof, found the law for the defendant, and rendered final judgment for it and against the plaintiff, for costs of suit. This is a sufficient special finding of facts to authorize us, under Section 700 of the Revised Statutes, to determine whether the facts found are sufficient to support the judgment.”

In the cases at bar the bill of exceptions is cast in almost the exact form of the bill in the *Coler* case.

It is, we think, unnecessary to discuss the cases cited by defendants (Defs. Br. p. 26). All these cases recognize the rule that the contentions of a plaintiff in error may be preserved by proper exceptions to the trial court's rulings on evidence. In no one of them, moreover, did the facts bring the case within the decision of the Supreme Court in *Coler v. Cleburne*.

It clearly appears from the foregoing, we submit, that even from the most technical standpoint, the questions urged by plaintiff are properly raised by the record. It seems hardly necessary to consider, therefore, whether defendants' contention could, in any

event, be sustained in view of the 1919 amendment to Section 269 of the Judicial Code (40 Stats. 1181; Fed. Stats. Ann. 1919, Supp. p. 231; Comp. Stats., Sec. 1246. See *Liberty Oil Co. v. Condon National Bank*, 260 U. S. 235, 244-245). That amendment is as follows:

“Sec. 269. * * * On the hearing of any appeal, certiorari, writ or error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

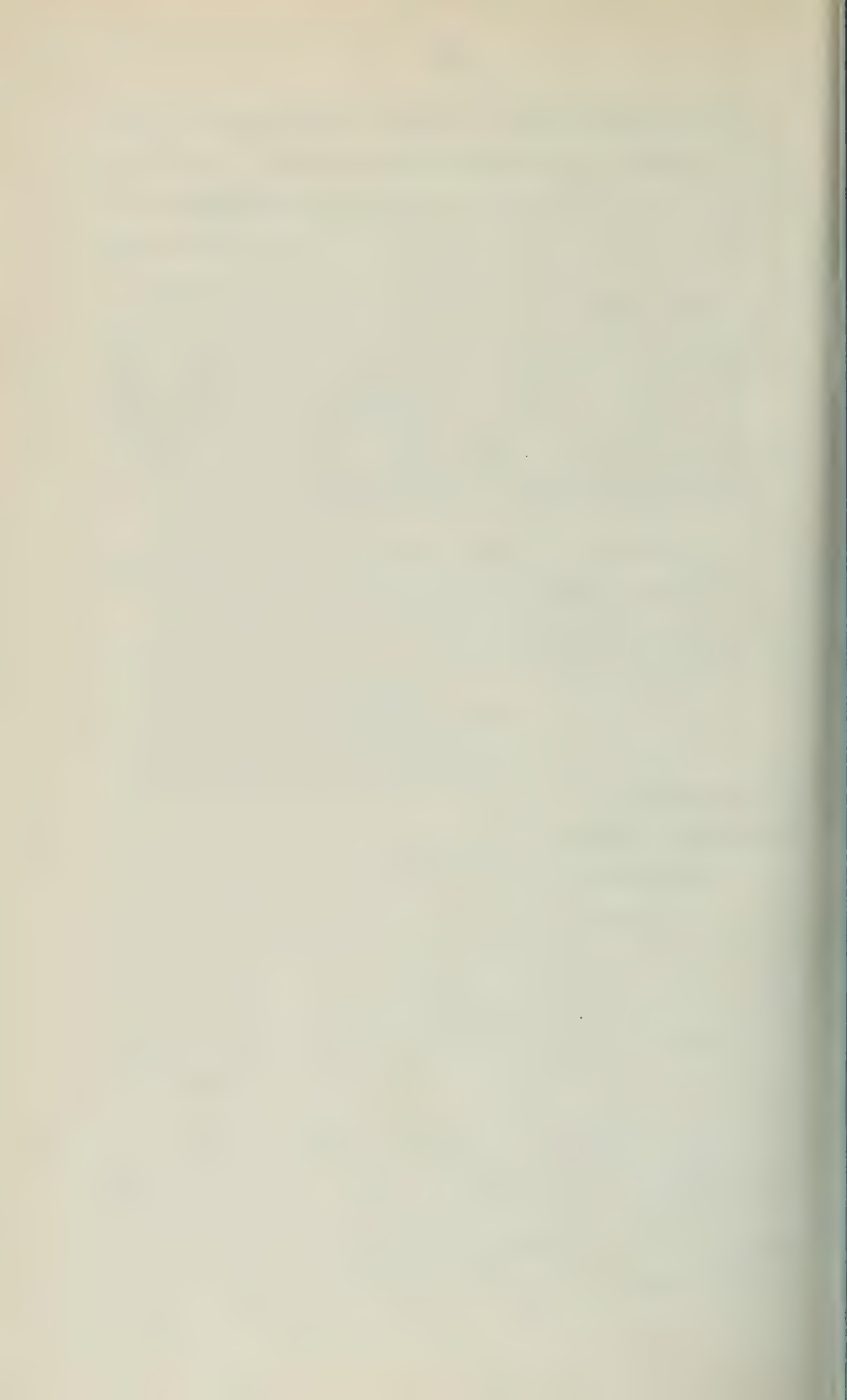
We respectfully submit that, as to the attorneys' fees, the judgments below should be reversed.

Dated, San Francisco,

June 11, 1924.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff in Error.

ALFRED SUTRO,
EUGENE M. PRINCE,
Of Counsel.



United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

ONE KISSEL TOURING AUTOMOBILE, and
SAN FRANCISCO SECURITIES COR-
PORATION,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

ONE KISSEL TOURING AUTOMOBILE, and
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PORATION,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

FREDERICK H. BERNARD, Esq., United States Attorney,

JOHN W. WALKER, Assistant United States Attorney, Tucson, Arizona,
Attorneys for Plaintiff in Error.

Messrs. KINGAN, CAMPBELL & CONNER, Tucson, Arizona,
Attorneys for Claimant, San Francisco Securities Corporation, Defendant in Error. [1*]

[1*]

In the District Court of the United States, for the District of Arizona.

No. 336—LAW—TUCSON.

UNITED STATES OF AMERICA

VS.

ONE KISSEL TOURING AUTOMOBILE.

Libel.

Comes now Frederick H. Bernard, United States Attorney for the District of Arizona, who, for the United States in this behalf, prosecutes, and respectfully represents and informs the Court:

That heretofore, and on or about the 22d day of October, A. D. 1922, in the county of Pima, State and District of Arizona, John A. Toomey, who was

*Page-number appearing at foot of page of original certified Transcript of Record.

then and there a Narcotic Inspector, did arrest one P. P. Means, *alias* Frank Mazzy, and did seize a certain Kissel Touring Automobile, Serial 470, Model 45, engine number 90414, bearing Arizona 1922 license 3-275, and a certain package, which said package contained approximately one grain of cocaine, the said cocaine being a derivative of cocoa leaves.

That said package and containers did not bear the Internal Revenue stamps required by law, and your informer alleges that the Internal Revenue tax imposed by law upon said cocaine, and required by law to be evidenced by a stamp placed on each package containing an ounce or fraction of an ounce of cocaine, had never been paid to the United States of America.

Your informant further alleges that at and just prior to the time of said seizure of said narcotics and said automobile, and the arrest of the said P. P. Means, *alias* Frank Mazzy, the said P. P. Means, *alias* Frank Mazzy was transporting the said narcotics in said automobile; that he, the said P. P. Means, *alias* Frank Mazzy had removed the said narcotics from some point in the District of

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Arizona, to your informant unknown, to a point near the intersection of Council and Church Streets, in the city of Tucson, in the District of Arizona, for the purpose of making a sale and delivery of said narcotics, and that said removal as aforesaid for the purpose aforesaid, [2] was effected by transporting the same in the said Kissel touring

automobile, and that the said narcotics were removed as aforesaid, with the intent on the part of him, the said P. P. Means, *alias* Frank Mazzy, to defraud the United States of the taxes which were then and there imposed by law on said narcotics.

Your informant further alleges that the said P. P. Means, *alias* Frank Mazzy was then and there a person who sold, dealt in, dispensed and gave away opium and coca leaves, and the derivatives thereof, and that he was not then and there registered with the Collector of Internal Revenue for the District of Arizona as a wholesale or retail dealer, and that he had not paid the special tax required by law to be paid by such dealers; and your informant alleges that he was then and there a person who was required to register and pay such special tax.

That the said P. P. Means, *alias* Frank Mazzy was at the time of the seizure of said automobile, using and employing the same in carrying on his business of selling, dealing in, dispensing and giving away opium, coca leaves, and the derivatives thereof, not in and from the original stamped packages, and on which the stamp required by law had not been paid, and without having registered and paid the special tax as required by law of dealers. That he was then and there using said automobile as a means of removal, and a place in which to deposit and conceal the nontax paid narcotics so unlawfully sold, dealt in, dispensed and given away by him, in fraud of the revenues of the United States.

Your informant alleges that said automobile is now in the custody of John A. Toomey, Narcotic Inspector as aforesaid, who holds the same as for-

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feited to the use of the United States by virtue of the terms and provisions of Section 3450 of the Revised Statutes of the United States.

That the said automobile is of the reasonable market value of approximately Fourteen Hundred Dollars. [3]

That your informant is advised, and here alleges, that said automobile was, at the time of its seizure, the property of one Monte Mansfeld, and was in the charge of the said P. P. Means, *alias* Frank Mazzy, who was driving and using said car for the unlawful purpose aforesaid.

WHEREFORE, for the reasons and causes aforesaid, your informant says, that said automobile became forfeited to the use of the United States, and your informant respectfully prays that due process and monition of this Court be awarded in this behalf to enforce said forfeiture, and that all persons, firms and corporations interested in said automobile be cited to answer in special and general the premises; and that due proceedings having been had thereon, the said automobile, for the causes aforesaid, and others appearing, be condemned by the definite sentence and decree of this Court as forfeited to the use of the United States, and that the same be ordered sold by the Marshal,

and the proceeds thereof applied in manner and form as is by law in such cases made and provided.

FREDERIC H. BERNARD,
United States Attorney.

[Endorsements]: Petition. Filed Mar. 14, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Earl T. Cox, Deputy Clerk. [4]

November, 1922, Term—Tucson Division.

In the District Court of the United States, District of Arizona.

Honorable M. T. DOOLING, United States District Judge for the Northern District of California, Specially Assigned, Presiding:

Minute Entry of April 16, 1923.

No. L.-335—(TUCSON).

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ONE KISSEL TOURING AUTOMOBILE.

Minutes of Court—April 16, 1923—Order Allowing Time to File Brief, etc.

IT IS ORDERED that the claimant herein be allowed five days within which to file his brief and the United States five days thereafter in which to answer. [5]

In the District Court of the United States for the
District of Arizona.

No. 336—LAW—TUCSON.

UNITED STATES OF AMERICA

vs.

ONE KISSEL TOURING AUTOMOBILE.

**United States Marshal's Return on Attachment
and Monition.**

I received the within writ at Phoenix, Arizona, March 16, 1923, and executed the same as follows:

On March 16, 1923, by writing a personal letter to J. A. Toomey, Narcotic Inspector for the District of Arizona, informing him that the automobile above described is attached in his possession, and directing him to detain the same in his custody until the further order of the Court respecting the same.

On March 17, 1923, at Tucson, Arizona, by posting at three conspicuous places in the city of Tucson, Arizona, a typewritten copy of a Notice of Hearing setting forth that this case would be called for hearing before the United States District Court at Tucson, Arizona, on the 16th day of April, 1923, at 10 o'clock A. M. (if that be a day of jurisdiction, and if not, then on the next day of jurisdiction thereafter at 10 o'clock in the forenoon of that day) and directing all persons claiming any right, title or interest in or to the property above described, to wit: one Kissel Touring Automobile, heretofore seized within the District of Arizona,

for reasons and causes mentioned in a certain information filed in that behalf, in Case No. 336—Law—Tucson in said court; and to all persons knowing or having anything to say why the Court should not pronounce against the same for the condemnation thereof, according to the prayer of the libel filed in this case, that they be and appear before the said District Court upon the date above mentioned, then and there to interpose a claim to said property and to make their allegations in that behalf.

I further executed this writ at Tucson, Arizona, by causing to be published in the “Arizona Daily Star,” a newspaper published in the city of Tucson, Arizona, a copy of the above-described notice of hearing. Said notice was published in said newspaper on March 20th and March 27th, 1923.

An affidavit of publication, signed by J. F. Carmichael, cashier of the State Consolidated Publishing Company, publisher of the “Arizona Daily Star,” setting forth the dates and facts, under oath, with regard to such publication, properly signed and sworn to, is hereto attached and made a part of this return.

T. J. SPARKES,
United States Marshal.
By W. P. McNair,
Deputy.

This 16th day of April, 1923. [6]

In the District Court of the United States for the
District of Arizona.

No. 336—LAW—TUCSON.

UNITED STATES OF AMERICA

VS.

ONE KISSEL TOURING AUTOMOBILE.

Notice of Hearing on Attachment and Monition.

Pursuant to warrant of attachment and monition issued out of the District Court of the United States for the District of Arizona, under the seal of that court, and dated March 14, 1923, and directed to me, public notice is hereby given to all persons claiming certain property, to wit: one certain Kissel Touring Automobile heretofore seized on land within the said District of Arizona, for reasons and causes mentioned in a certain information filed in that behalf in the case entitled United States of America *versus* One Kissel Touring Automobile, being Cause No. 336—Law—Tucson, in said court.

The said property was seized as aforesaid having been by me attached in the custody of John A. Toomey, Narcotic Agent for the District of Arizona, and being now detained in my custody within the said District of Arizona by order of the said Court.

And to all persons knowing and having anything to say why said Court should not pronounce against the same for the forfeiture thereof, ac-

according to the prayer of said information, and that they be and appear before the said court to be holden in and for the said District of Arizona in the United States courtroom in the city of Tucson, in the same district, on the 16th day of April, A. D. 1923, at 10:00 o'clock A. M. (if that be a day of jurisdiction, and if not, on the next day of jurisdiction thereafter at 10 o'clock in the forenoon of that day), the same being return day of the warrant aforesaid, and day of trial of said seizure and information, then and there to interpose a claim to the said property, and to make their allegations in that behalf.

T. J. SPARKES,

United States Marshal for the District of Arizona.

F. H. BERNARD,

United States Attorney.

This 16th day of March, 1923. [7]

In the District Court of the United States for the
District of Arizona.

No. 336—LAW—TUCSON.

UNITED STATES OF AMERICA

vs.

ONE KISSEL TOURING AUTOMOBILE.

Attachment and Monition.

The President of the United States to the United States Marshal for the District of Arizona,
GREETING:

WHEREAS, a libel of information and forfeiture has been filed in the District Court of the United States for the District of Arizona, on the 14th day of March, A. D. 1923, by the United States of America, against one certain Kissel Touring Automobile, which said automobile is in the present custody and possession of one John A. Toomey, Narcotic Inspector of the United States, for the District of Arizona, claimed as forfeited to the United States for having been unlawfully used in transporting and dealing in narcotics contrary to law, and for causes and reasons in said libel mentioned, and praying for usual monition of said court in that behalf to be made, and that all persons interested in said automobile may be cited in general and in special to answer the premises, and all proceedings being had, that the said automobile for the causes and libel mentioned, be condemned and sold to pay the demands of the libellant.

YOU ARE HEREBY COMMANDED, to attach the said Kissel Touring Automobile hereinabove described, and detain the said automobile in your custody until the further order of this Court respecting the same, and to give due notice to all persons claiming the same, or known to have or having anything to say why said [8] automobile

should not be condemned and sold pursuant to the prayer of said libelant, and that they be and appear before the said court to be held in and for the District of Arizona, at Tucson, Arizona, on the 16th day of April, A. D. 1923, at ten o'clock in the forenoon of said day, if the same be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf.

What you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS the Honorable WILLIAM H. SAWTELLE, Judge of the District Court of the United States for the District of Arizona, at the courtroom in the city of Tucson, in said District, this 14th day of March, A. D. 1923, and in the Independence of the United States the one hundred and forty seventh.

[District Court Seal]

C. R. McFALL,

Clerk.

[Endorsements]: Attachment and Monition. Filed Apr. 17, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By R. C. McAllaster, Deputy Clerk. [9]

In the District Court of the United States for the
District of Arizona.

No. 336—LAW—TUCSON.

UNITED STATES OF AMERICA

vs.

ONE KISSEL TOURING AUTOMOBILE.

Order of Publication.

The United States Attorney for the District of Arizona, having filed a libel of information and forfeiture in the above-entitled cause, it is now, by the Court,—

ORDERED that the usual attachment and monition be issued, directed to the United States Marshal for the District of Arizona, to seize the said Kissel Touring Automobile in said libel described, and the Court hereby fixes the 16th day of April, A. D. 1923, at ten o'clock in the forenoon, in the United States courtroom, at Tucson, Arizona, as the time and place for the hearing and trial upon said libel and information, and the Marshal is hereby directed to give notice of the time and place of said hearing, by giving the substance of such libel, with the order of Court thereon, setting forth the time and place for trial, to be inserted in some newspaper at or near the place of seizure in the said District of Arizona, once a week for two consecutive weeks, and by posting the same in the most public manner at Tucson, and vicinity for

the space of fourteen days next preceding the time fixed for said hearing and trial.

Done in open court this 14th day of March, A. D. 1923.

WM. H. SAWTELLE,
District Judge.

[Endorsements]: Order. Filed Mar. 14, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Earl T. Cox, Deputy Clerk. [10]

In the District Court of the United States for the
District of Arizona.

No. 336-LAW—(TUCSON).

UNITED STATES OF AMERICA

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Claimant.

**Answer and Claim of San Francisco Securities Cor-
poration.**

Comes now San Francisco Securities Corpora-
tion, a corporation organized under and by virtue
of the laws of the State of California and doing
business in the State of Arizona, and files this its
answer and claim in the above-entitled matter and
admits, denies and alleges as follows:

I.

Admits upon information and belief that on or about the 22d day of October, 1922, in the county of Pima, State and District of Arizona, John A. Toomey, who was then and there a narcotic inspector, did seize a certain Kissel touring automobile serial 470, Model 45, Engine No. 90414, bearing Arizona 1922 license 3-275, and that said automobile is now in the custody of the said John A. Toomey, Narcotic Inspector, who holds said automobile claiming the same to be forfeited to the United States by virtue of the terms and provisions of Section 3450 of the Revised Statutes of the United States.

II.

Admits that said automobile is of the reasonable value of Fourteen Hundred Dollars (\$1400.00).

III.

San Francisco Securities Corporation has no knowledge or information sufficient upon which to form a belief relative to the other allegations contained in the libel or information heretofore filed in the above-entitled matter by Frederick H. Bernard, United States Attorney for the District of Arizona, and [11] therefore, denies each and every of said allegations; and further answering says: that if so it be that said automobile was used for the purposes set forth in said libel or information, such use thereof was without the knowledge or consent of the San Francisco Securities Corporation; alleges: that if so it be that said automobile was used for the purposes set forth in said libel or information, such use thereof did not and does not

constitute a violation of Paragraph 3450 of the Revised Statutes of the United States.

IV.

Said San Francisco Securities Corporation denies that said automobile became forfeited to the use of the United States.

V.

San Francisco Securities Corporation further alleges that on or about October 4, 1922, one Monte Mansfeld, being then and there the owner of said Kissel automobile, entered into a conditional sales contract in writing for the sale thereof to the said P. P. Means, *alias* Frank Mazzy, also known as Frank Means, and on said 4th day of October, 1922, for value received in the usual course of business the said Monte Mansfeld sold and assigned said conditional sales contract to San Francisco Securities Corporation; that said conditional sales contract, with the assignment thereof to the San Francisco Securities Corporation endorsed thereon, was filed for record in the office of the county recorder of Pima County, Arizona, on October 5, 1922; that of the purchase price provided by the terms of said conditional sales contract to be paid by the said Means there was unpaid at the time of the seizure of said automobile, and is still unpaid, the sum of Eight Hundred Sixty-six Dollars (\$866.00), and that by reason of the nonpayment of the installments of said purchase price as required by said conditional sales contract San Francisco Securities Corporation [12] is now the owner of and entitled to the possession of said automobile.

WHEREFORE, San Francisco Securities Corporation prays that this Honorable Court order that said Kissel touring automobile be released and discharged, and delivered to San Francisco Securities Corporation.

KINGAN, CAMPBELL & CONNER,

Attorneys for Claimant.

State of Arizona,

County of Pima,—ss.

Lautaro Roca, having been first duly sworn, on oath deposes and says: That he is agent of San Francisco Securities Corporation and makes this affidavit as such agent of said corporation for and on its behalf; that he has read the foregoing answer and claim, and is familiar with the contents thereof, and that the same is true of his own knowledge except as to the matters and things therein alleged on information and belief, and that as to such matters and things he believes it to be true.

LAUTARO ROCA.

Subscribed and sworn to before me this 16th day of April, 1923.

[Seal]

HELEN M. CLARKE,

Notary Public, Pima County, Arizona.

(My commission expires Oct. 2, 1926.)

[Endorsements]: Answer and Claim of San Francisco Securities Corporation. Filed Apr. 16, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [13]

In the District Court of the United States for the
District of Arizona.

No. 336-LAW—(TUCSON).

UNITED STATES OF AMERICA

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Claimant.

Agreed Statement of Facts.

It is hereby agreed and stipulated by and between Frederick H. Bernard, United States Attorney, and Kingan, Campbell and Conner, representing the San Francisco Securities Company, that the facts in the above-entitled case are substantially as follows:

That one Frank Means, *alias* Frank Mazzy, on the 22d day of October, A. D. 1922, sold to a female drug addict two capsules of cocaine at No. 445 West Congress Street, in Tucson, Arizona. The said two capsules of cocaine were delivered to the addict on a call by the said Frank Means, *alias* Frank Mazzy, he driving to the house of said addict at the above number in a Kissel Touring Car, bearing Arizona license number 3-275. Later the same evening the said Frank Means, *alias* Frank Mazzy, attempted to make another delivery of narcotics to the same addict at the corner of Council and Church Streets, in said city of Tucson, Arizona. The said Means, *alias* Mazzy, drove up to the cor-

ner in said Kissel Touring Car above described, honked his horn, and the addict to whom delivery was to be made came from the shadow to receive the narcotics, when officers rushed out and arrested the said Means, *alias* Mazzy. Said Means, *alias* Mazzy, attempted to swallow the capsules of narcotics on the approach of the officers, but was prevented from so doing. He was at said time driving said Kissel Touring Automobile, bearing Arizona license number 3-275, serial number [14] 370, model 45, engine number 90414, being the same car in which said former delivery had been made.

Said Means, *alias* Mazzy, was indicted by the Grand Jury of this district on February 16, 1923, for violation of Section 1, Act of December 17, 1914, as amended by the Act of February 24, 1919, having possession and selling cocaine, to which indictment he entered his plea of "guilty," and was sentenced by the Court to serve four months in the Pima County jail.

The San Francisco Securities Corporation has the interest in said Kissel automobile claimed by it in its answer and claim filed herein and had no knowledge of any unlawful use thereof.

That in delivering and attempting to deliver narcotics as aforesaid, the said Frank Means, *alias* Frank Mazzy, carried such narcotics upon his person, he being at the time within said Kissel automobile.

JOHN W. WALKER,
Asst. United States Attorney,
KINGAN, CAMPBELL & CONNER,
Attorneys for Claimant.

[Endorsements]: Agreed Statement of Facts.
Filed Apr. 21, 1923. United States District Court
for the District of Arizona. C. R. McFall, Clerk.
By R. C. McAllaster, Deputy Clerk. [15]

In the District Court of the United States for the
District of Arizona.

No. L.-336—TUCSON.

THE UNITED STATES OF AMERICA

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Claimant.

Opinion and Order Dismissing Libel.

FREDERICK H. BERNARD, Esq., United States
Attorney, and JOHN W. WALKER, Esq., As-
sistant United States Attorney, Attorneys for
the United States.

KINGAN, CAMPBELL & CONNER, Attorneys
for Claimant.

One P. P. Means was arrested while in an auto-
mobile of the value of \$1400.00 when about to de-
liver unlawfully an unstamped capsule containing
one grain of cocaine which he had transported in
the automobile to the place of delivery. The co-
caine and automobile were seized and Means was
arrested. Upon indictment for the unlawful deal-
ing in narcotics he pleaded guilty and was sentenced

to jail. The Government then filed this libel asking that the automobile be forfeited under Section 3450, R. S., for the reason that Means used it in removing the unstamped cocaine with intent to defraud the Government of the taxes then and there imposed by law thereon and also as a place of deposit and concealment with the same intent. The taxes in question amounted to one cent, being the tax imposed by the Harrison Act of one cent an ounce or fraction thereof, to be paid by the importer, manufacturer, producer or compounder, and to be represented by appropriate stamps affixed to the bottle or other container. The automobile belongs to San Francisco [16] Securities Corporation and was in the possession of Means under a conditional sales contract upon which the sum of \$866.00 is still due. Means was engaged in the unlawful business of selling narcotics and had already, on the day of his arrest, delivered two similar capsules, transporting them in the automobile to the place of delivery. In each instance the capsules were concealed on the person of Means, he being within the automobile.

Section 3450, R. S., declares forfeited any vehicle used in the removal or for the deposit or concealment of any article upon which a tax is imposed, when such vehicle is so used with intent to defraud the United States of such tax. The effect of this statute in a case identical with the present one was considered by Judge Cushman in the cases of *U. S. vs. One Ford Truck* and *U. S. vs. One Touring Car*, 285 Fed. 204. He held that the words removal and

removed as used in Section 3450 are not synonymous with transportation or transported, but have reference to the removal from some definite place where the tax imposed is due and where it should be paid before the taxed articles are taken therefrom. With this construction of the statute I entirely agree, and there is nothing in the facts of this case to show such removal. He also held that the unstamped drugs when in the pocket of the driver of the automobile were neither deposited nor concealed in the automobile within the meaning of the statute, his decision in that regard being as follows:

“The narcotics described in these informations were not in any sense ‘concealed’ in the automobile, but they were ‘concealed’ upon the person of the driver as would be a ‘concealed’ weapon. The automobile was not the place of ‘deposit’ of the narcotics in either case, but the narcotics were placed or ‘deposited’ in the pocket of the driver and he then got into the automobile. No fair construction of the word ‘deposit’ would describe such an act.” [17]

I am not sure that being “concealed” and “deposited” in the pocket of the driver, he being in the automobile, the narcotics may not well be said to be concealed and deposited in the automobile as well. But it requires more to warrant the forfeiture of the automobile than the deposit or concealment with intent to defraud the United States of the tax imposed on them, and the burden is upon the Government to show that such was the intent. Means, the driver of the car, was, so far as ap-

pears, neither importer, manufacturer, producer or compounder of the drugs, nor connected in any way with any of them. The tax was not due from him, nor would he have been permitted to pay it. His possession of the drugs was unlawful, and if he disclosed such possession for the purpose of offering to pay the tax, he would subject himself to arrest and the drugs and automobile to seizure. His concealment of the drugs is to be attributed, in my judgment, to the fact that he knew that he was engaged in an unlawful business rather than to the fact that he was trying to evade the payment of a tax of one cent. It should be a clear case which would warrant the forfeiture of an automobile valued at \$1400.00, and belonging to one not connected with the transaction, for the failure on the part of some one unknown to pay to the Government a one cent tax. The difficulties of cases like the present would be obviated if Congress would make the vehicle subject to forfeiture for the transportation therein of narcotics upon which the tax had not been paid. But Congress has not so done, and the trouble here arises from an endeavor to fit a law passed in 1866 to delinquencies created by the Harrison Act over fifty years later. Nothing stated herein applies or is intended [18] to apply to forfeitures, under the National Prohibition Act, for the unlawful transportation of intoxicating liquor.

The libel will be dismissed.

May 9th, 1923.

M. T. DOOLING,
Judge.

[Endorsements]: Opinion and Order Dismissing Libel. Filed May 9, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [19]

May, 1923, Term—Tucson.

In the District Court of the United States for the
District of Arizona.

Honorable M. T. DOOLING, United States District
Judge for the Northern District of California,
Specially Assigned, Presiding.

Minute Entry of May 9, 1923.

No. L-336—(TUCSON).

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Claimant.

**Minutes of Court—May 9, 1923—Order Dismissing
Libel.**

The claim of the San Francisco Securities Corporation, claimant herein, for the return of the automobile seized in this case, having been heretofore submitted to the Court, and by the Court taken under advisement, and the Court having fully considered the same,

IT IS NOW ORDERED that the claim of the said San Francisco Securities Corporation be, and the same is hereby granted, and that the automobile seized herein be released and returned to said claimant, and the libel against said automobile be dismissed.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Defendants.

Minutes of Court—May 9, 1923—Judgment.

This matter coming on regularly to be heard on this 9th day of May, A. D. 1923, F. H. Bernard, Esq., United States Attorney, [20] and John W. Walker, Esq., Assistant United States Attorney, appearing for the plaintiff, and Kingan, Campbell and Conner appearing as attorneys for the claimant, the San Francisco Securities Corporation; the case was submitted to the Court for its consideration and decision, upon an agreed statement of the facts, a copy of which is filed in this matter. The Court having fully considered the matter does find that the claimant is entitled to a return of the automobile as prayed for in its petition, and it is therefore

ORDERED, ADJUDGED and DECREED that the petition of claimant, the San Francisco Securi-

ties Corporation, to have returned to it one certain Kissel Touring Automobile be and the same is hereby allowed, and the libel filed herein dismissed, and the automobile in question ordered returned to the claimant, the San Francisco Securities Corporation upon the payment of all necessary costs incurred by the Government for storage. [21]

In the District Court of the United States for the
District of Arizona.

No. L.-336—TUCSON.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Defendants.

Assignment of Errors.

Comes now the United States of America, plaintiff in the above-entitled matter, and files the following assignment of errors, upon which it will rely upon its appeal from the decree made by this Honorable Court, on the 9th day of May, 1923, in the above-entitled cause:

First. That the Court erred in sustaining the petition of claimant herein.

Second. That the Court erred in not finding the automobile subject to confiscation under Sec-

tion 3450, Revised Statutes of the United States of America.

Third. That the Court erred in dismissing plaintiff's libel.

Fourth. That the Court erred in releasing the seized property from custody, and returning same to the claimant.

Dated at Tucson, Arizona, this 12th day of October, 1923.

FREDERIC H. BERNARD,
United States Attorney for the District of Arizona.

[Endorsements]: Assignment of Errors. Filed Oct. 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By J. Lee Baker, Deputy Clerk.

Copy received this 12th day of October, 1923.

KINGAN, CAMPBELL & CONNER,
Attorneys for San Francisco Securities Corporation. [22]

In the District Court of the United States for the
District of Arizona.

No. L.-336—TUCSON.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORATION,
Defendants.

Petition for Writ of Error.

To the Honorable, The Judges of the District Court
of the United States, Within and for the Dis-
trict of Arizona.

The United States of America, plaintiff in the
above-entitled cause, conceiving itself aggrieved
and prejudiced in various orders and rulings
of the Court in said cause, and alleging divers
grievous and prejudicial errors by the Court in the
making of said orders and rulings and final judg-
ment herein, has filed an assignment of errors com-
plained of, and prays for an allowance of a writ of
error in said cause to the United States Circuit
Court of Appeals for the Ninth Circuit, and that
a transcript of the record and proceedings, duly
authenticated, may be sent to said Court of Ap-
peals.

THE UNITED STATES OF AMERICA,

Plaintiff.

By FREDERIC H. BERNARD,

United States Attorney for the District of Arizona.

[Endorsements]: Petition for Writ of Error.
Filed Oct. 12, 1923. United States District Court
for the District of Arizona. C. R. McFall, Clerk.
By J. Lee Baker, Deputy Clerk.

Copy received this 12th day of October, 1923.

KINGAN, CAMPBELL & CONNER,

Attorneys for San Francisco Securities Corpora-
tion. [23]

In the District Court of the United States for the
District of Arizona.

No. L.-336—TUCSON.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Defendants.

Order Allowing Writ of Error.

Upon the hearing of the petition for a writ of error herein, it appearing that an assignment of errors has been duly made and filed as required by law, it is:

ORDERED, that the writ of error be, and the same is hereby, allowed, to the end that the judgment of the Court heretofore entered herein may be reviewed in the United States Circuit Court of Appeals for the Ninth District.

October 12, 1923.

WM. H. SAWTELLE,
Judge.

[Endorsements]: Order Allowing Writ of Error.
Filed Oct. 12, 1923. United States District Court
for the District of Arizona. C. R. McFall, Clerk.
By J. Lee Baker, Deputy Clerk. [24]

In the Circuit Court of Appeals, Ninth Circuit.

No. LAW-336.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Defendants in Error.

Writ of Error (Copy).

United States of America,—ss.

The President of the United States, CALVIN
COOLIDGE, To the Honorable Judge of the
District Court of the United States for the
District of Arizona, GREETINGS:

Because in the record and proceedings, as also
in the rendition of the judgment of a plea which is
in the said District Court before you between the
United States of America, plaintiff in error, and
One Kissel Touring Automobile, and San Francisco
Securities Corporation, defendants in error, a mani-
fest error has happened to the damage of the United
States of America, plaintiff in error, as by said com-
plaint appears, and we being willing that error, if
any hath been, should be corrected, and full and
speedy justice be done to the parties aforesaid in
this behalf, do command you if judgment be therein
given, that under your seal you send the record and

proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause [25] further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this the 12th day of October, A. D. 1923.

[Seal] C. R. McFALL,
Clerk of the United States District Court for the
District of Arizona.

Allowed this 12 day of October, A. D. 1923.

WM. H. SAWTELLE,
United States Judge. [26]

In the District Court of the United States for the
District of Arizona.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Defendants.

Return to Writ of Error (Copy).

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Ninth Circuit of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said District Court, at my office, in the city of Tucson, Arizona, this 24th day of October, A. D. 1923.

[Seal]

C. R. McFALL,
Clerk of said Court.

[Endorsements]: Writ of Error. Filed Oct. 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By J. Lee Baker, Deputy Clerk. [27]

In the District Court of the United States for the
District of Arizona.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Defendants.

Citation on Writ of Error (Copy).

To the San Francisco Securities Corporation, De-
fendant in Error:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, California, on the 13th day of November, A. D. 1923, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the District of Arizona, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, United States District Judge, District of Arizona, this 12th day of October, A. D. 1923.

WM. H. SAWTELLE,
United States District Judge.

I hereby, this 12 day of October, A. D. 1923, accept due personal service of the foregoing citation on behalf of the San Francisco Securities Corporation, defendant in error.

KINGAN, CAMPBELL & CONNER,
Attorneys for San Francisco Securities Corporation. [28]

[Endorsements]: Citation. Filed Oct. 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By J. Lee Baker, Deputy Clerk. [29]

In the District Court of the United States for the District of Arizona.

No. 336—TUCSON.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORATION,
Defendants.

Praeipce for Transcript of Record.

To the Clerk of said Court:

Please prepare transcript on appeal to the United States Circuit Court of Appeals, Ninth Circuit, in the above-entitled cause, same to consist of the following:

1. Libel.
2. Writ of attachment and monition.
3. Order of publication.
4. Return to order of publication.
5. Answer and claim of San Francisco Securities Corporation.
6. Agreed statement of facts.
7. Opinion of the Court.
8. Order discharging automobile.
9. Assignment of errors.
10. Petition for writ of error.
11. Order allowing writ of error.
12. Writ of error.
13. Citation.
14. Praecipe for transcript.
15. Clerk's certificate.

UNITED STATES OF AMERICA,
Plaintiff.

FREDERIC H. BERNARD,
United States Attorney for the District of Arizona.
By JOHN W. WALKER,
Assistant United States Attorney.

[Endorsements]: Filed Oct. 17, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By J. Lee Baker, Deputy Clerk. [30]

In the District Court of the United States for the
District of Arizona.

No. L.-336—(TUCSON).

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Defendants in Error.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the United States District Court for the District of Arizona, including the records, papers and files in the case of United States of America vs. One Kissel Touring Automobile and San Francisco Securities Corporation, Numbered L.-336 (Tucson) on the docket of said court.

I further certify that the attached pages, numbered One to 31, inclusive, contain a full, true and correct transcript of certain records and proceedings in said case, as called for in the praecipe for transcript filed in this case and made a part of the

transcript attached hereto, as the same appear from the originals of record and on file in my office as such clerk, in the city of Tucson, State and District aforesaid.

I further certify that the clerk's fees for preparing the transcript of this record amount to Nineteen and 40/100 Dollars (\$19/40), and the same have been charged to the United States as constructive earnings.

I further certify that the original writ of error and original citation issued in this cause are attached hereto and made a part hereof.

WITNESS my hand and the seal of said court, this 30th day of October, 1923.

[Seal]

C. R. McFALL,

Clerk.

By Agnes Borrego,

Deputy Clerk. [31]

In the Circuit Court of Appeals, Ninth Circuit.

No. LAW-336.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,

Defendants in Error.

Writ of Error (Original).

United States of America,—ss.

The President of the United States, CALVIN COOLIDGE, to the Honorable Judge of the District Court of the United States, for the District of Arizona, GREETINGS:

Because of the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between the United States of America, plaintiff in error, and One Kissel Touring Automobile, and San Francisco Securities Corporation, defendants in error, a manifest error has happened to the damage of the United States of America, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at San Francisco, in the State of California where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the

laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this the 12th day of October, A. D. 1923.

[Seal]

C. R. McFALL,
Clerk of the United States District Court for the District of Arizona.

Allowed this 12th day of October, A. D. 1923.

WM. H. SAWTELLE,
United States Judge.

In the District Court of the United States for the District of Arizona.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,
Defendants.

Return to Writ of Error (Original).

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Ninth Circuit of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of said District Court, at my office,

in the city of Tucson, Arizona, this 24th day of October, A. D. 1923.

[Seal]

C. R. McFALL,
Clerk of Said Court.

[Endorsed]: No. L.-336—Tucson. In the District Court of the United States for the District of Arizona. United States of America vs. One Kissel Touring Automobile, San Francisco Securities Corp. Writ of Error. Filed Oct. 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By J. Lee Baker, Deputy Clerk.

In the District Court of the United States for the
District of Arizona.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ONE KISSEL TOURING AUTOMOBILE, SAN
FRANCISCO SECURITIES CORPORA-
TION,
Defendants.

Citation on Writ of Error (Original).

To the San Francisco Securities Corporation, De-
fendant in Error:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, California, on the 13th day of November, A. D. 1923, pursuant to a

writ of error filed in the clerk's office of the District Court of the United States, for the District of Arizona, wherein the United States of America, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, United States District Judge, District of Arizona, this 12th day of October, A. D. 1923.

WM. H. SAWTELLE,
United States District Judge.

I hereby, this 12th day of October, A. D. 1923, accept due personal service of the foregoing citation on behalf of the San Francisco Securities Corporation, defendant in error.

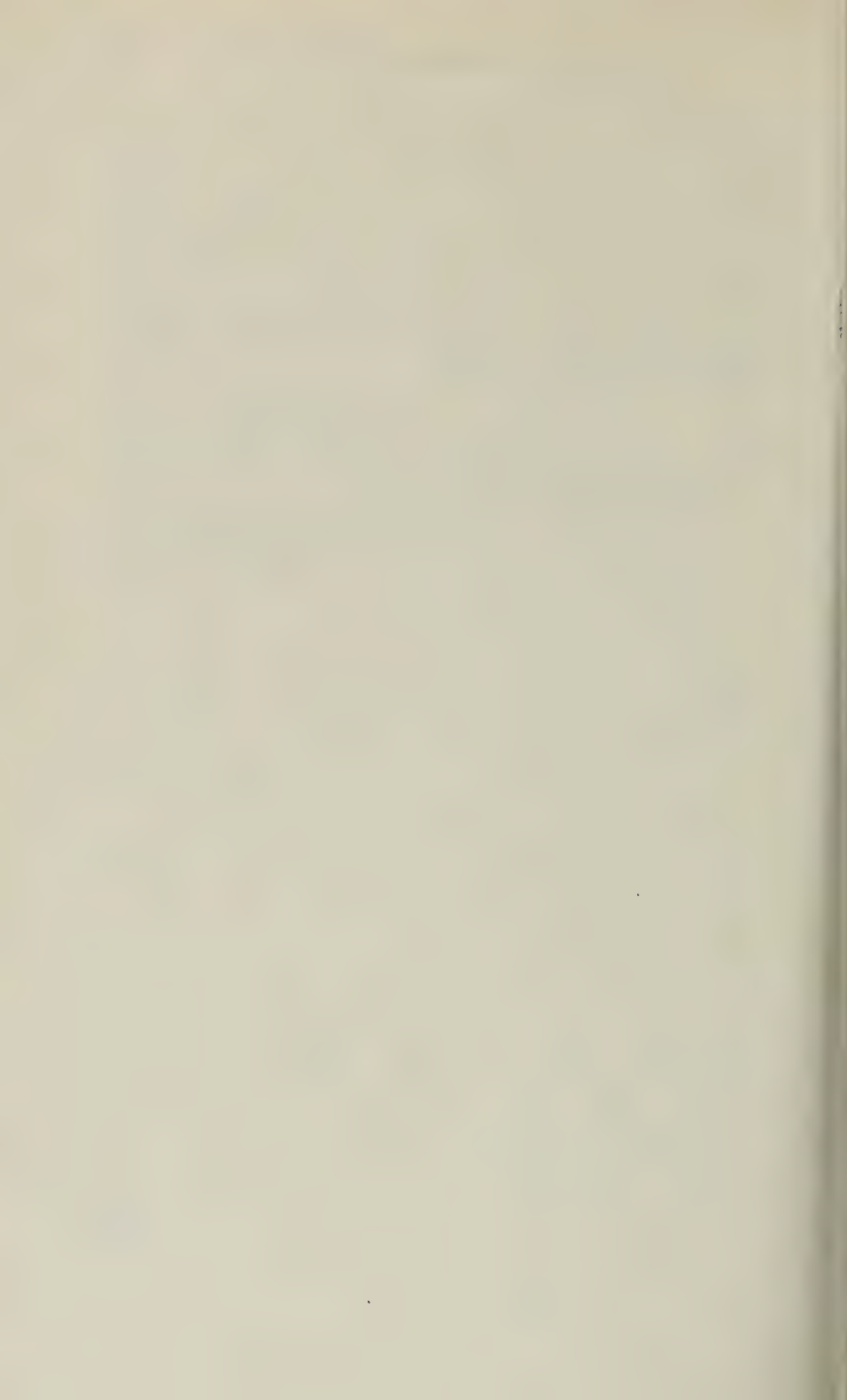
KINGAN, CAMPBELL & CONNER,
Attorneys for San Francisco Securities Corporation.

[Endorsed]: No. L.-336—Tucson. In the District Court of the United States for the District of Arizona. United States of America vs. One Kissel Touring Automobile, San Francisco Securities Corp. Citation. Filed Oct. 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By J. Lee Baker, Deputy Clerk.

[Endorsed]: No. 4127. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. One Kissel Touring Automobile, and San Francisco Securities Corporation, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona. Filed November 1, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

ONE KISSEL TOURING AUTOMOBILE,

San Francisco Securities Corporation,

Defendants in Error.

No. 4127

BRIEF OF PLAINTIFF IN ERROR

FREDERICK H. BERNARD,

United States Attorney,

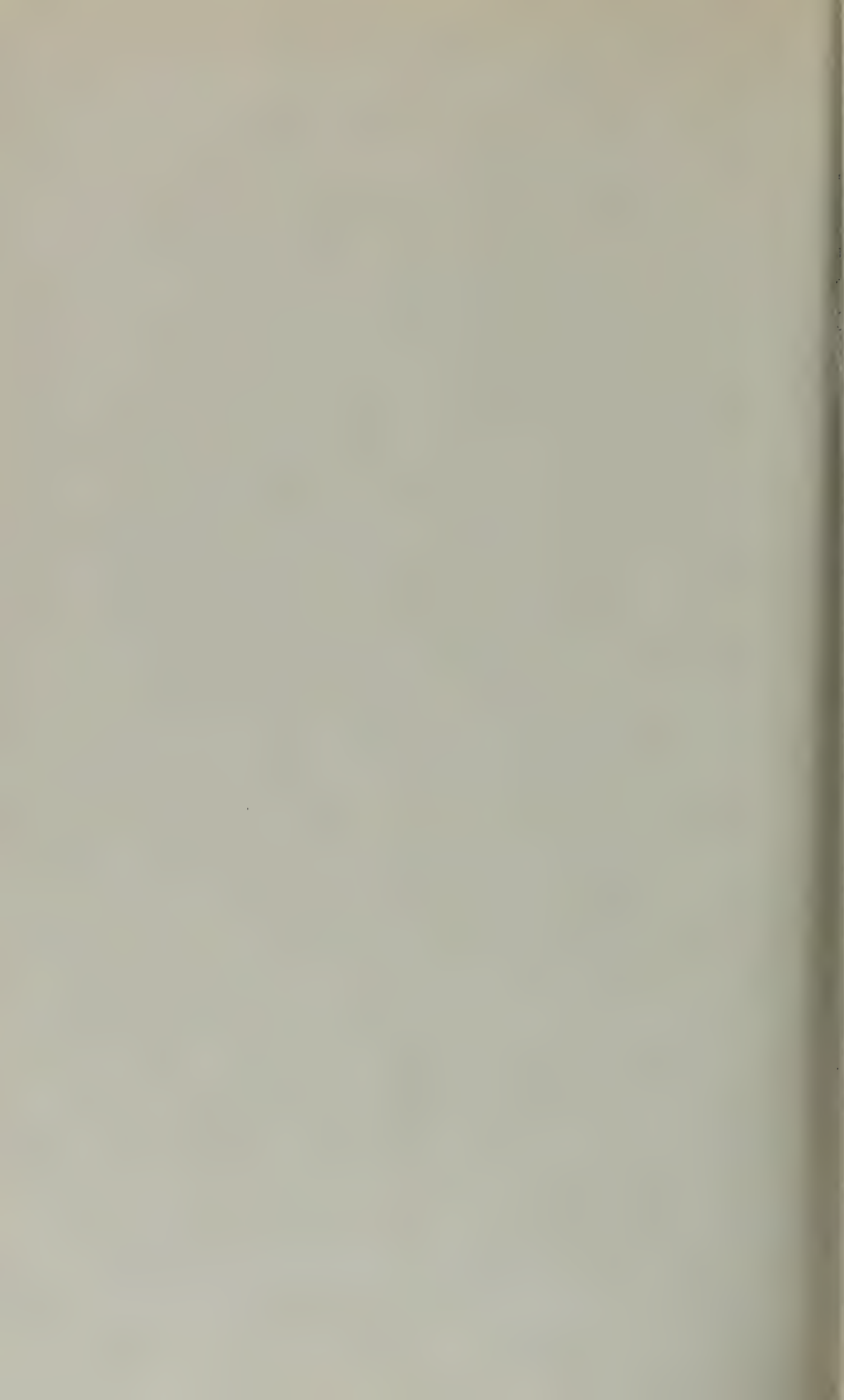
Attorney for Plaintiff in Error.



FILED

JAN 28 1924

F. H. REDDINGTON



UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

ONE KISSEL TOURING AUTOMOBILE,

San Francisco Securities Corporation,

Defendants in Error.

No. 4127

BRIEF OF THE PLAINTIFF IN ERROR.

The libel or information in this case shows that the automobile involved was seized by a Government narcotic inspector within the District of Arizona on or about October 22, 1922; that said inspector at the time of seizure arrested the driver thereof, finding on his person a package of cocaine not bearing the revenue stamps required; that the tax provided by law had never been paid to the United States; that at the time of said arrest and seizure said driver was transporting said narcotics in said automobile and had removed them from a point in the District of Arizona unknown to a point in the City of Tucson in said

District for the purpose of making a sale thereof and that said removal was with the intent to defraud the United States of the taxes; that the driver was using said automobile as a means of removal; and that the automobile was held by said inspector as forfeited to the United States under Section 3450 of the Revised Statutes of the United States.

The San Francisco Securities Corporation filed an answer and claim to said libel alleging that it was the owner and entitled to the possession of said automobile and disclaimed any knowledge of or consent to said use and alleged that such use therefore does not constitute a violation of said Section 3450; prayed that said automobile be released and discharged and delivered to them.

The agreed statement of facts has been filed (Transcript of Record, p. 17) and this matter is to be submitted on briefs.

The holding of Judge Dooling in this District was adverse to the contention of the Government and from it this appeal has been taken.

ASSIGNMENTS OF ERROR

1. That the Court erred in sustaining the petition of claimant herein;

2. That the Court erred in not finding the automobile subject to confiscation under Section 3450, Revised Statutes, United States of America;

3. That the Court erred in dismissing plaintiff's libel;

4. That the Court erred in releasing the seized property from custody and returning same to the claimant.

ARGUMENT

Inasmuch as the law applicable to the questions raised by each of the errors assigned is so interwoven with that applicable to the others, they may well, for the purpose of argument, be here considered as one.

An analysis of the opinion of Judge Dooling in this case (said opinion being reported in 289 Federal Reporter 120) (Transcript of Record, p. 19) shows (1) that his construction of the words "removal" and "removed" is not synonymous with "transportation" or "transported," but has reference to the removal from some definite place, where the tax imposed is due, and where it should be paid before the taxed articles are taken therefrom; (2) that to warrant the forfeiture of an

automobile for deposit or concealment of drugs therein they must have been so deposited or concealed with intent to defraud the Government of the tax imposed on them and the burden of showing such intent is on the Government; (3) that the facts show that in this instance the concealment of the drugs by the driver is to be attributed to the fact that he knew that he was engaged in an unlawful business rather than to the fact that he was trying to evade the payment of the tax of one cent.

This decision is in a large measure based upon the construction of the provisions of Section 3450 R. S. (Comp. Stat. Paragraph 6452) which, so far as that part of it which relates to the facts herein concerned, reads as follows:

“Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed * * * are removed or are deposited or concealed in any place with intent to defraud the United States of such tax, * * * every vessel, boat, cart, carriage, or other conveyance whatsoever * * * and all things used in the removal or for the deposit and concealment thereof respectively shall be forfeited.”

The construction given this statute by Judge Dooling is one of extreme strictness. As to the manner in which the forfeiture provision of a

revenue statute should be construed the United States Supreme Court in the case of the United States vs. Stowell, 133 U. S. 1, 10 Supreme Court 244, 245, used the following language:

“By the now settled doctrine of this Court
* * * statutes to prevent frauds upon the revenue are considered as created for the public good and to suppress a public wrong and therefore although they impose penalties or forfeitures are not to be construed, like penal statutes generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature.”

The Supreme Court of the United States further, in the case of Ash Sheep Company vs. United States, 252 U. S. 159, 40 Supreme Court 241, 4 Law Ed. 507, lays down the rule in the following words:

“The admitted rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning OR EVEN THE MORE EXTENDED OF TWO MEANINGS (*ours*) where such construction best harmonizes with the context and most fully promotes the policy and objects of the legislature.”

As to the meaning of the word “remove” we cite the case of *In Re Wilmington Hosiery Com-*

pany, 120 Fed. 180, 182, which defines it in the following language:

“The word ‘removed’ as employed in Bankruptcy Act, July 1, 1898, c 541 Paragraph 3a, Subdivision 1, 30 Statutes 546 (U. S. Comp. Stat. 1901, p. 3422), providing that acts of bankruptcy shall consist in having removed property with intent to hinder creditors, whether taken by itself or viewed in the light of the context, clearly signifies an actual or physical change in the position or locality of the property constituting the subject of the removal.”

The Supreme Court of the State of Alabama in the case of *Davis vs. the State*, 68 Ala. 58, 44 American Reports 128, construed the act of said state of February 1, 1879, which made it unlawful to “transport or move” cotton in the seed during the nighttime, etc. In this case the indictment under such act used the words “transport or remove.” It was held that the words “move” and “remove” as so used were equivalent in meaning.

We have but to examine the decisions of the courts of the various districts in cases similar to this to see that the forfeiture of automobiles for carrying or “removing” goods or commodities for or in respect whereof any tax is or shall be “imposed” is a common thing.

In the case of the United States vs. One Essex Touring Automobile et al., 266 Fed. 138 (District Court, Northern District Georgia, July 1, 1920), in the words of Sibley, District Judge:

"The libel proceeds under Revised Statutes, Paragraph 3450 (Comp. Stat., Paragraph 6352), providing for the forfeiture of vehicles used for the removal, deposit or concealment of any article on which a tax is due and unpaid with intent to defraud the United States of the tax, and alleges that on April 20, 1920, the automobile libeled was used for the removal of eighty gallons of intoxicating distilled spirits with the intent aforesaid."

By demurrer the libel was sought to be dismissed on the ground that the remedy under R. S. Paragraph 3450, was inconsistent with the Eighteenth Amendment and Section 26 or Title 2 of the National Prohibition Act, but the Court held the forfeiture valid, stating that R. S. Paragraph 3450, deals only with untaxed liquor and may extend to cases of deposit and concealment as well as to cases of transportation, * * * and that the forfeiture arises from no illegality under the Prohibition Act, but wholly under the Revenue Law. The Court further stated that:

"The causes of action are unlike and independent of each other. It is true that an automobile transporting untaxed intoxicating liquors without permit may transgress both

statutes at the same time, but that results only in giving the United States an election as to which cause of forfeiture it will pursue. Revised Statutes, Paragraph 3450, still has its place in the law and the remedy under it may be sustained in this case if the facts alleged are proven."

Later the same Court, in the case of the United States vs. One Essex Touring Automobile, 276 Federal Reporter 28, stating that the automobile in question there was libeled for condemnation under Revised Statutes 3450 (Comp, Stat. Paragraph 6352), * * * on the grounds that it was used by a person unknown for the removal, deposit and concealment of eighty gallons of distilled spirits in respect of which a tax was imposed which had not been paid, with intent to defraud the United States of the tax, went on to say:

"The question of repeal here raised was examined in this Court in One Essex Touring Automobile, 266 Federal 138, and the conclusion reached that forfeiture under Revised Statutes, Paragraph 3450, might be had notwithstanding the provisions of the National Prohibition Act. A review of this conclusion has now been had in the light of the case of the United States vs. Yuganovich, 256 U. S. 450, decided by the Supreme Court June 1, 1921. That case settles that the laws taxing distilled or other intoxicating liquors

are not repealed by the National Prohibition Act, but these remain 'goods or commodities in respect of which a tax is or shall be imposed' mentioned in Revised Statutes, Paragraph 3450."

Further, the Court made a statement in this opinion which is of considerable significance as displaying the view of that Court in this connection, when they use the following words:

"One may violate Revised Statutes, Paragraph 3450, by removing or concealing liquors on which a tax is due and unpaid with intent to defraud of the tax, even though he have all requisite permits for transportation and possession under the Prohibition Act. * * * Yet if he and the automobile were engaged in an effort to defraud the Government of the tax due, there is no more reason why the penalty for so doing should be relaxed in the case of distilled liquors than in the case of any other taxed articles. One may wonder why greater severity should be prescribed by Congress in the matter of forfeitures as well as penalties in protection of the revenue laws than in enforcing constitutional prohibition, but that is not a judicial problem."

The automobile in this case was forfeited. The same view of the law was held by the District Court, Southern District of Alabama, in the

case of the steamship Tuscan, reported in 276 Federal at page 55, forfeiture being claimed by the Government under Paragraph 3450 of said steamship for conveying, transporting and concealing liquors thereon with intent to defraud the United States of a tax.

The case of Rio Atlanta Company vs. Stern, 279 Federal Reporter 422, Sibley, District Judge, upheld a judgment forfeiting an automobile under Paragraph 3450, which recited that the automobile was used in transporting, concealing and depositing liquors on which a tax had not been paid.

The Supreme Court of the United States on January 17, 1921, in the case of J. W. Goldsmith, Jr.-Grant Company vs. United States, reported in 254 U. S. at page 505, Mr. Justice McReynolds dissenting, upheld the forfeiture of a Hudson automobile under Paragraph 3450, Revised Statutes, which said automobile it was charged was used by three persons in the removal and for the deposit and concealment of fifty-eight gallons of distilled spirits upon which a tax was imposed by the United States and had not been paid.

Though specific intent be essential its existence may be inferred from the circumstances under the usual rule that every sane man is presumed to intend the usual and probable consequences of his act. Thus an intent to commit

murder may be inferred from the use of a deadly weapon or other attendant circumstances in the absence of evidence negating such intent (16 C. J. 116).

In 16 C. J. at page 81 in speaking of specific intent the author, while stating that the burden of proving specific intent is on the state, states also that the affirmative proof required may be "either by direct or circumstantial evidence * * * and that it is sufficient * * * to prove facts from which the specific intent may be inferred."

Recognizing the validity of Judge Dooling's holding herein that "the burden is upon the Government to show that such was the intent" (Transcript of Record, p. 21), may not specific intent be inferred from the facts set forth in the agreed statement of facts in this case (Transcript of Record, pp. 17, 18)?

Clearly we may not infer or draw from said statement of facts any intent on the part of the driver of the automobile herein involved to pay the tax due.

Every man is presumed to know the law; the driver here must be presumed to have known it, and that the law called for the payment of the tax. Are we to say that the automobile shall not be forfeited because the tax due on the narcotics in question amounted to only one cent and that

a different rule would apply if the quantity carried had been much greater? If the weight of the narcotics involved in this case, the other facts and circumstances being the same, had been ten pounds, what deduction would follow as to the existence or non-existence of an intent to pay the tax? Must the weight of the narcotics be ascertained before the existence or non-existence of intent can be determined? This cannot be the law.

Is Judge Dooling's opinion to be so construed as to mean that "goods or commodities for or in respect whereof any tax is or shall be imposed" not manufactured or known at the time of the enactment of the statute or not then in commerce as articles thereof were not in contemplation of the statute, and that therefore though subsequently recognized in "delinquencies created by the Harrison Act" the statute cannot be applied? No. For the statute itself discounts this assumption, for the words therein "or shall be imposed" show that Congress had in mind the fact that new "goods or commodities" are daily coming into existence and that future sessions of that body may from time to time extend the provisions of its tax statutes to cover and include such new commodities.

The Supreme Court of the United States in the case of J. W. Goldsmith, Jr.-Grant Company vs. United States hereinbefore cited, held that the automobile in said case referred to so used by a person who had it on credit from an owner who retained the title is subject to libel and forfeiture although the owner was without notice of the forbidden use, and that the statute treats the "thing" as the offender.

Judge Dooling in his opinion herein (Transcript of Record, p. 21) in commenting upon that part in Judge Cushman's opinion (reported in 286 Fed. 204) dealing with the terms "concealed" and "deposited" says: "I am not sure that being 'concealed' and 'deposited' in the pocket of the driver, he being in the automobile, the narcotics may not well be said to be 'concealed' and 'deposited' in the automobile as well."

We agree with Judge Dooling in questioning Judge Cushman's interpretation of these terms and submit further: that the Government in this case has sustained the burden of proving the intent of the driver to defraud the Government of the taxes then and there imposed by law on said narcotics; that in none of the cases herein cited by the Government has it been shown that

the "removing" or "removal" was a "removal from some definite place where the tax imposed is due and where it should have been paid before the taxd articles are taken therefrom" but on the contrary they were just such cases of "removal" as this one; that though the tax was imposed by the Harrison Act there was also a violation of Paragraph 3450, the general taxing act of Congress, in this regard.

Respectfully submitted,

FREDERICK H. BERNARD,

Attorney for PLAINTIFF Error.

No. 4127

IN THE

United States Circuit Court of Appeals /

For the Ninth Circuit

THE UNITED STATES OF AMERICA,	}
<i>Plaintiff in Error,</i>	
VS.	
ONE KISSEL TOURING AUTOMOBILE and SAN FRANCISCO SECURITIES CORPORATION,	
<i>Defendants in Error.</i>	

BRIEF FOR DEFENDANTS IN ERROR.

KINGAN, CAMPBELL & CONNER,
Attorneys for Defendants in Error.

REDMAN & ALEXANDER,
W. C. BACON,
Of Counsel.

FILED

FEB - 24 - 1921

U. S. DISTRICT COURT



No. 4127

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,	}
<i>Plaintiff in Error,</i>	
VS.	
ONE KISSEL TOURING AUTOMOBILE and SAN FRANCISCO SECURITIES CORPORATION,	
<i>Defendants in Error.</i>	

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

This is a writ of error to the United States District Court of the District of Arizona sued out by the Government to reverse an order of that court dismissing the libel of the Government against One Kissel Touring Automobile upon the objection of the claimant, San Francisco Securities Corporation, the owner of the automobile. The opinion of District Judge Dooling dismissing the libel is reported in 289 Fed. 120.

The libel or information charges in substance that the automobile was seized by the Government Nar-

cotic Inspector on or about October 22, 1922, and that at the same time said inspector arrested the driver, P. P. Means, alias Mazzy, and seized a package containing approximately one grain of cocaine which was found upon the person of the driver; that the package did not bear the revenue stamps required and that the tax thereon had never been paid to the United States; that at said time said driver was transporting said narcotics in said automobile and had removed them from an unknown point in the District of Arizona to a point in the City of Tuscon in said district for the purpose of selling the same; that said removal was with the intent to defraud the United States of the taxes thereon; that the driver was using the automobile as a means of removal; and that the automobile was held by the inspector as forfeited to the United States under Section 3450 of the Revised Statutes of the United States.

The San Francisco Securities Corporation, defendant in error here, appeared in the condemnation proceedings and by its answer alleged that it was the owner of and entitled to the possession of the automobile pursuant to a conditional sale contract under which Means was in possession of it; disclaimed any knowledge of or consent to the use of it as alleged in the libel; alleged that such use does not constitute a violation of Section 3450, Revised Statutes and asked that the libel be dismissed and the automobile delivered to it.

The agreed statement of facts (Transcript, page 17) filed in the proceedings establishes the claim of the San Francisco Securities Corporation to the automobile, its disclaimed knowledge of any unlawful use, and that in attempting to deliver the capsule of cocaine Means carried it "upon his person, he being at the time within the said Kissel automobile".

Upon these facts the trial court decided that there was no violation of Section 3450, Revised Statutes, and dismissed the libel. We submit that the decision of the District Court is in accord with the requirements of justice and sound principles of statutory construction and should therefore be affirmed.

Argument.

THE AGREED FACTS DO NOT SUSTAIN THE ALLEGATIONS IN THE LIBEL OF REMOVAL, DEPOSIT AND CONCEALMENT OF NARCOTICS WITH INTENT TO DEFRAUD THE UNITED STATES OF TAXES DUE THEREON.

It is evident that the agreed statement of facts does not sustain the allegations of the libel. It is alleged in the libel that at the time of the arrest and seizure the driver, Means, "was then and there using said automobile as a means of removal and a place in which to deposit and conceal the non-taxed said narcotics", whereas the agreed facts are that the cocaine was carried "upon his (Means') person, he being at the time within said Kissel automobile".

The statute pursuant to which the libel or information was filed is Section 3450, Revised Statutes of the United States, the pertinent portions of which are as follows:

“And be it further enacted, That in case of any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities shall be REMOVED, or shall be deposited or concealed IN ANY PLACE, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case, and IN EVERY CASE WHERE ANY GOODS OR COMMODITIES SHALL BE FORFEITED, under this act or any other act of Congress relating to the internal revenue, ALL AND SINGULAR THE CASKS, vessels, cases or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively AND EVERY VESSEL, BOAT, CART, CARRIAGE, OR OTHER CONVEYANCE WHATSOEVER, and all HORSES or other animals, AND ALL THINGS USED IN THE REMOVAL OR FOR THE DEPOSIT OR CONCEALMENT THEREOF, respectively, shall be forfeited; and every person who shall REMOVE, deposit or conceal, or be concerned in REMOVING, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not exceeding five hundred dollars.” (Capitals ours.)

The libel or information charges three things against the automobile, to-wit: that it was used

(1) as a means for the *removal* of the narcotics, and as a place for the (2) *deposit*, and (3) *concealment* thereof, all

“with the intent * * * to defraud the United States of the taxes which were then and there imposed by law on said narcotics”.

The precise question as to whether the facts here established sustain the charge of *removal* with intent to defraud the United States of the tax imposed, has been considered by the United States District Court for the Western District of Washington, Northern Division, in two cases decided together; *United States v. One Ford Truck*, and *United States v. One Paige Touring Car*, 286 Fed. 204; in which that court construed the statute here involved in accord with our views. After an exhaustive consideration of the term “removal” as used in Section 3450, R. S., the court concluded:

“The foregoing statutes show that the word ‘removed’, as used in Section 14, has reference to removal from particular, specified places designated by law. These statutes clearly show the character of places meant, and the fact that they were not again enumerated in Section 14 of the Act of July 13, 1866, probably arises out of the fact that it was a general section meant to cover illegal removals from all places mentioned in the several sections of the Act.”

And in the case at bar the District Court, in adopting the foregoing view, said:

“The effect of this statute in a case identical with the present one was considered by Judge Cushman in the cases of *U. S. v. One Ford*

Truck and U. S. v. One Touring Car, (D. C.) 286 Fed. 204. He held that the words 'removal' and 'removed', as used in section 3450, are not synonymous with 'transportation' or 'transported', but have reference to the removal from some definite place, where the tax imposed is due and where it should be paid, before the taxed articles are taken therefrom. With this construction of the statute I entirely agree, and there is nothing in the facts of this case to show such removal."

The facts here are identical with those considered by the court in the Washington cases referred to above, and in passing upon the question of *deposit* and *concealment*, that court said:

"The narcotics described in these informations were not in any sense 'concealed' in the automobile, but they were 'concealed' upon the person of the driver as would be a 'concealed' weapon. The automobile was not the place of 'deposit' of the narcotics in either case, but the narcotics were placed or 'deposited' in the pocket of the driver and he then got into the automobile. No fair construction of the word 'deposit' would describe such an act."

Although the trial judge in this case did not entirely agree with the reasoning of Judge Cushman upon that point, he nevertheless had no difficulty in also finding that there had been no violation of the statute in this respect. After quoting from the opinion in the Washington cases, Judge Dooling said:

"I am not sure that, being 'concealed' and 'deposited' in the pocket of the driver, he be-

ing in the automobile, the narcotics may not well be said to be concealed and deposited in the automobile as well. But it requires more to warrant the forfeiture of the automobile than the deposit or concealment of the drugs therein. They must be so deposited or concealed with intent to defraud the United States of the tax imposed on them, and the burden is upon the government to show that such was the intent. Means, the driver of the car, was so far as appears, neither importer, manufacturer, producer, or compounder of the drugs, nor connected in any way with any of them. The tax was not due from him, nor would he have been permitted to pay it. His possession of the drugs was unlawful, and if he disclosed such possession for the purpose of offering to pay the tax, he would subject himself to arrest and the drugs and automobile to seizure. His concealment of the drugs is to be attributed, in my judgment, to the fact that he knew that he was engaged in an unlawful business, rather than to the fact that he was trying to evade the payment of a tax of one cent. It should be a clear case which would warrant the forfeiture of an automobile valued at \$1400, and belonging to one not connected with the transaction, for the failure on the part of some one unknown to pay to the government a one cent tax."

This, we submit, ~~is~~ the just and sound construction of the statute. It is elementary and fundamental that such a statute should be given a construction "consistent with justice and the dictates of natural reason".

Counsel for the Government complains of the "strictness" of Judge Dooling's construction of

the statute, but it is a principle of statutory construction that confiscatory laws must and should be "strictly" construed. In 25 *Corpus Juris* 1172, the rule is stated as follows:

"A statute imposing a forfeiture should be construed strictly and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation. The courts will usually give such a construction to statutes providing for forfeitures as will be consistent with justice and the dictates of natural reason, although contrary to the strict letter of the law."

And this rule has its foundation in the Fourth Amendment to the Federal Constitution, which provides:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated * * *."

II.

THE OBJECTIONS RAISED BY GOVERNMENT'S COUNSEL TO THE DECISION OF THE TRIAL COURT ARE NOT WELL TAKEN.

The cases cited by counsel for the Government which give a "more extended" meaning to the term *removal*, are not in point for the reason that the term is construed in those cases as used in the Bankruptcy Act and other than forfeiture statutes, the principles of construction applicable being very dif-

ferent. The case of *U. S. v. One Essex*, 266 Fed. 138, and the other cases cited to the effect that automobiles seized while transporting liquor upon which the tax has not been paid may be proceeded against either under the Prohibition Act or Section 3450, R. S., are also not in point because the precise question of whether, under the facts of this case, there has been a removal or deposit or concealment with intent to defraud the Government of a tax was not considered by the court in any of them. Furthermore, the weight of authority upon the question decided in those cases is contrary to the view expressed in the cases cited. See

Lewis v. U. S., 280 Fed. 5 (6th Circuit);

U. S. v. One Haynes, 274 Fed. 926 (5th Circuit);

U. S. v. One Packard, 284 Fed. 394;

McDowell v. U. S., 286 Fed. 521 (9th Circuit);

U. S. v. Yuginovich, 256 U. S. 450.

Counsel argues in effect that we *may not infer* from the agreed facts any *intent* on the part of the driver *to pay* the tax due and therefore we *may infer* an *intent to defraud* the Government of the tax. This argument, of course, is fallacious. Could it possibly be inferred from the fact that Means had a one grain capsule of cocaine *in his pocket*, he being in the automobile, that he had used the automobile (valued at \$1400.00) for the purpose of deposit and concealment with the intent to defraud the Govern-

ment of a tax of one cent due it upon the capsule of cocaine? Clearly not. As Judge Dooling says in his opinion:

“Means, the driver of the car, was so far as ducer, or compounder of the drugs, nor con-appears, neither importer, manufacturer, pro-nected in any way with any of them. The tax was not due from him, nor would he have been permitted to pay it. His possession of the drugs was unlawful, and if he disclosed such possession for the purpose of offering to pay the tax, he would subject himself to arrest and the drugs and automobile to seizure. His con-cealment of the drugs is to be attributed, in my judgment, to the fact that he knew that he was engaged in an unlawful business, rather than to the fact that he was trying to evade the payment of a tax of one cent.”

The burden of proving the removal or deposit or concealment in the automobile *with intent to defraud the Government* of the tax due is upon the Government. This burden it has failed to sustain by any proof and the only inference to be drawn from the agreed facts is that there was *no* intent on the part of the driver of the automobile to defraud the Government of any tax but a desire to protect himself in the illegitimate business of *selling* narcotics. For that offense the *wrongdoer* is subject to punishment as provided by the law prohibiting it but the *automobile* cannot be guilty of that offense and is not subject to seizure because of it. The *automobile* can be forfeited under Section 3450, R. S., only if it is *itself* the offender—only if it is

the means of *removal*, as this term is used in the statute, or is used to *deposit* or *conceal* the contraband goods. The libel charges the *automobile* in this case with these offenses, but the facts clearly do not sustain the charges.

III.

THE AUTOMOBILE IS NOT SUBJECT TO FORFEITURE UNDER SECTION 3450 REVISED STATUTES WHICH IS RENDERED INEFFECTIVE IN NARCOTIC CASES BY THE PROVISIONS OF THE HARRISON NARCOTIC ACT AS AMENDED.

Even though it were established by the agreed facts that the *automobile* was guilty of the charges of *removal* or *deposit* or *concealment*, it still would not be subject to forfeiture under Section 3450, R. S., because that statute has been rendered ineffective in narcotic cases by the provisions of the Harrison Narcotic Act (38 Stat. 785-790), as amended (40 Stat. 1113).

The Harrison Narcotic Act provides a complete scheme for the regulation of the narcotics mentioned therein. It provides its own penalties and forfeitures. Therefore, general provisions in other statutes such as Section 3450, R. S., do not apply, for if an act purports to and does provide all the penalties for violation of its provisions there is no application of the general revenue statutes. *Expressio unius est exclusio alterius*. Inasmuch as the Narcotic Act is special and declares a more limited forfeiture it must be intended to restrict all for-

feitures to the scope so defined. Sections 1 and 9 of the Narcotic Act make provision for fines, imprisonment and certain forfeitures. Section 7 provides that the collection laws generally are applicable but does not mention *forfeiture* laws. The penalty of Section 9 of the Narcotic Act is a two thousand dollar fine or not more than five years' imprisonment, which penalty is different from those provided in Section 3450, R. S., thereby showing that the Narcotic Act is inconsistent with Section 3450 and within the field covered by the Narcotic Act the provisions of Section 3450, R. S., are therefore repealed.

It has been repeatedly held that general statutes are, to the extent that a subsequent statute conflicts with them impliedly repealed by such later statute. In construing the Oleomargarine Act it was held by the District Court of Illinois in

United States v. One Bay Horse, 128 Fed.
207,

that R. S. 3450 and R. S. 3453 did not apply and the following language was used:

"The government seeks to apply Sections 3450 and 3453 of the Revised Statutes, passed prior to the Oleomargarine Act * * *. Such would be the case had not Congress provided a special penalty in section 17, which limits the forfeiture to the 'factory and manufacturing apparatus used by the manufacturer and all oleomargarine and raw material for its production, found in the premises'. It must be assumed that by the omission of the more drastic measures of the prior act Congress intended to distinguish between the violations of

law in regard to which the penalties are imposed, respectively (citing cases). A statute imposing a penalty for an offense is *pro tanto* repealed by a subsequent statute fixing a lighter penalty (citing cases)."

Another similar instructive opinion construing the Food Conservation Act of August 10, 1917, is contained in

U. S. v. One Ford Automobile, 259 Fed. 894, in which case the forfeiture of the automobile under a prior general statute was denied.

While some courts have held that automobiles seized while illegally transporting intoxicating liquor could be forfeited under R. S. 3450, the great weight of authority is to the effect that the National Prohibition Act provides a complete scheme of regulations, fines, penalties and forfeitures in dealing with intoxicating liquors and that therefore R. S. 3450 with its more drastic forfeiture provisions is impliedly repealed to an extent by the provisions of the Prohibition Act and that there cannot be a forfeiture under R. S. 3450 of the vehicle used in transporting or concealing intoxicating liquor manufactured or intended for beverage purposes with intent to defraud the revenue laws. Upon this point this court in the case of

McDowell v. U. S., 286 Fed. 521, speaking through Mr. Justice Hunt, says:

"Our conclusion is that in so far as it is provided by Section 3450 for the forfeiture of automobiles used to transport liquor upon which the tax has not been paid, the section has been

repealed by the provisions of the National Prohibition Act”

and cites a number of cases in accord with its view. To the same effect see

U. S. v. One Haynes Automobile, 274 Fed. 926;

Lewis v. U. S., 280 Fed. 5;

U. S. v. Yuginovich, 256 U. S. 450;

Farley v. U. S., 269 Fed. 724;

U. S. v. One Hudson Auto, 274 Fed. 473;

U. S. v. One Packard Automobile, 284 Fed. 394;

U. S. v. Footman, 268 Fed. 873;

Ketchum v. U. S., 270 Fed. 416.

We submit, therefore, that the order of the District Court dismissing the libel should be affirmed not only for the reasons set forth in the opinion of the District Court but also for the foregoing additional reasons.

Dated, San Francisco,

February 6, 1924.

Respectfully submitted,

KINGAN, CAMPBELL & CONNER,

Attorneys for Defendants in Error.

REDMAN & ALEXANDER,

W. C. BACON,

Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOE TEMPERANI,

Plaintiff in Error,

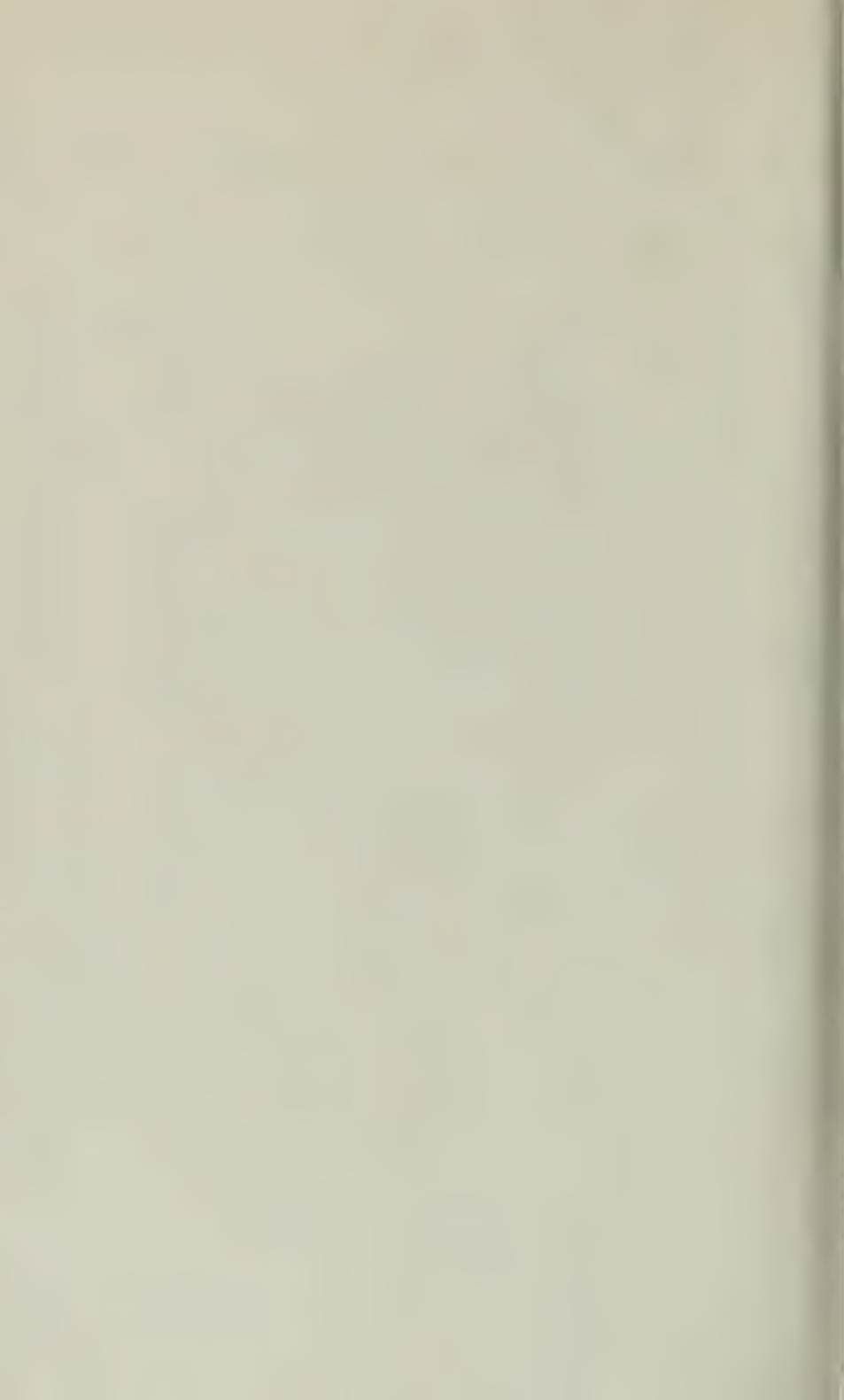
vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
First Division.



United States
Circuit Court of Appeals
For the Ninth Circuit.

JOE TEMPERANI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Defendant and Plaintiff in Error:

EDWARD A. O'DEA, Esq., and WALTER
McGOVERN, Esq., San Francisco, Cal.

For Plaintiff and Defendant in Error:

UNITED STATES ATTORNEY, San Fran-
cisco.

UNITED STATES OF AMERICA.

District Court of the United States, Northern Dis-
trict of California.

Clerk's Office.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Praecipe (For Transcript on Writ of Error).

To the Clerk of Said Court:

Sir: Please prepare the transcript of record upon
writ of error in the above-entitled cause.

1. Information.
2. Arraignment.
3. Plea of defendant.
4. Petition for return of property and exclusion
of evidence.

5. Answer of Government to petition to return property and exclude evidence.
6. Affidavit of Government in support of answer to petition to return property and exclude evidence.
7. Order submitting motion to return property, etc.
8. Order denying motion to return property, etc.
9. Record of trial.
10. Verdict of jury.
11. Judgment of Court.
12. Motions for new trial and in arrest of judgment.
13. Orders denying each.
14. Clerk's certificate to judgment-roll.
15. Petition for writ of error.
16. Assignment of errors.
17. Citation on writ of error.
18. Return thereto.
19. Order allowing writ of error and supersedeas.
[1*]
20. Supersedeas bond.
21. Cost bond on appeal.
22. Bill of exceptions.
23. Writ of error (original).
24. Clerk's certificate to transcript of record.
25. Admission of service of citation on writ of error.
26. Admission of service of writ of error.

*Page-number appearing at foot of page of original certified Transcript of Record.

27. Stipulations and orders of May 17, 1923; June 16, 1923; June 29, 1923, and July 28, 1923.

EDWARD A. O'DEA and
WALTER McGOVERN,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 18, 1923. Walter B. Mal-
ling, Clerk. By C. W. Calbreath, Deputy Clerk.
[2]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

(No. 12,554.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Information.

At the November term of said Court, in the year
of our Lord one thousand nine hundred and twenty-
two.

BE IT REMEMBERED that John T. Williams,
United States Attorney for the Northern District of
California, by and through Kenneth M. Green, As-
sistant United States Attorney, who for the United
States in its behalf prosecutes in his own proper
person, comes into court on this, the 3d day of Janu-
ary, 1923, and with leave of the said Court first

having been had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which our informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents:
THAT

JOE TEMPERANI,

hereinafter called the defendant, heretofore, to wit, on or about [3] 1st day of December, 1922, at 354 Orazabo St., in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully, and unlawfully have in his possession certain property designed for the manufacture of liquor, to wit, 3-20 gal. stills; 3 oil-stoves; 1 hydro-meter; 1500 gals. of mash,—then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendant was then and there prohibited, unlawful and in violation of Section 25 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [4]

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents:
THAT

JOE TEMPERANI

hereinafter called the defendant, heretofore, to wit, on or about the 1st day of December, 1922, at 354 Orazabo St., in the City and County of San Francisco in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit, 25 gals. of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28th, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [5]

THIRD COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof,

NOW, THEREFORE, your informant presents:
THAT

JOE TEMPERANI,

hereinafter called the defendant, heretofore, to wit, on or about the 1st day of December 1922, at 354 Orazabo St., in the City and County of San Francisco in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully manufacture certain intoxicating liquor, to wit, 25 gals. of what is called jack-ass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the manufacture of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act

of Congress of October 28th, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided. [6]

JOHN T. WILLIAMS,
United States Attorney.
KENNETH M. GREEN,
Asst. U. S. Attorney. [7]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. Laumeister, being first duly sworn, deposes and says: That, Joe Temperani, on or about the 1st day of December, 1922, at 354 Orazabo St., City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there wilfully and unlawfully have in his possession certain property designed for the manufacture of liquor, to wit: 3-20 gal. still; 3 oil-stoves; 1 hydro-meter; 1500 gals. of mash, then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor, containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said property, by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in

violation of Section 25 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act,"

And affiant on his oath aforesaid further deposes and says: That Joe Temperani on or about the 1st day of December, 1922, at 354 Orazabo St., City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there possess certain intoxicating liquor, to wit, 25 gals. of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act." [8]

And affiant on his oath aforesaid further deposes and says: That —, on the — day of —, 1921, at —, County of —, in the — Division of the Northern District of California, and within the jurisdiction of this Court, did then and there — certain intoxicating liquor, to wit: —, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the — of the said intoxicating liquor by the said — at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of

October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath aforesaid deposes and says: That Joe Temperani, on the 1st day of December, 1922, at 354 Orazabo St., City and County of San Francisco, in the Southern Division and District aforesaid, did then and there manufacture certain intoxicating liquor, to wit, 25 gals. of what is called jackass brandy, then and there containing one-half of one per cent, or more of alcohol by volume and fit for use for beverage purposes.

That the manufacture of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

W. LAUMEISTER.

Subscribed and sworn to before me this 30 day of Dec., 1922.

[Seal]

C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California. [9]

[Endorsed]: Filed Jan. 3, 1923. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [10]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPORANI,

Defendant.

Petition for Return of Property and Exclusion of Evidence.

To the Honorable, the Above-entitled Court:

The petition of Joseph Temporani, respectfully shows:

That he was arrested on the 1st day of December, 1922, and charged with violating the "National Prohibition Law," and that an information charging him with said offense was filed in this Court on the 3d day of January, 1923.

That on the 1st day of December, 1922, he and his family resided at 354 Orazabo Street in the City and County of San Francisco, State of California; that said premises consisted of a one-story dwelling-house with a basement and a garage underneath said dwelling-house; that said basement was used for the keeping of the various things necessary for family use; that said basement was in the rear portion of said premises and led into the garage which was in the front portion of same; that to said garage

there were double doors, which, on the last-mentioned date, were closed and locked. That in the upper portion of said premises were beds, furniture, food and ordinary things used for maintaining a household, and that all of said premises was the *bona fide* dwelling of the petitioner.

That on the last-mentioned date, and while the petitioner was absent from the premises above-described Prohibition Enforcement Agents Powers and Laumeister, without asking the permission of the defendant or any of the occupants of the dwelling-house, and without the authorization of any search-warrant or order of [11] Court and without any warrant for the arrest of defendant and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and without witnessing, before their entry into said premises, any act or acts which could be construed as a violation of the laws of the United States, and without seeing any liquor or property designed for the manufacture of liquor in plain sight and without previously having made a purchase of liquor from said premises and merely on information received from the Ingleside Police Station, illegally and unlawfully entered said premises by going to the rear of same, opening the rear basement door and walking through said basement into the garage above mentioned, and they, illegally and unlawfully and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and without the authorization of a search-warrant and in the manner above described proceed to search said base-

ment and said garage; and as a result of their unlawful and illegal search they, illegally and unlawfully, found in said garage two twenty-gallon stills, three old stoves, one hydrometer, 1500 gallons of mash and 25 gallons of what is called jackass brandy and they, the said Federal Prohibition Enforcement agents, unlawfully and illegally and without the authorization of any search-warrant, and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and in the manner above described, seized same and took same away with them against the will of the defendant, without his permission, without warrant or right of law, and they profess to hold the same against the will of your petitioner as evidence of a violation of the law on the part of your petitioner; that said articles are held without process of law and your petitioner is entitled either to their return or to have them excluded from the evidence at the trial of said cause.

That the garage above mentioned was a private garage, where the defendant kept his automobile which he used for himself, his wife and children, and was part of the dwelling. [12]

That the Prohibition Enforcement Director, the Prohibition Enforcement agents, and the United States Attorney propose to use said evidence at the trial of the above-entitled cause and that by reason thereof, and the facts set forth, the defendant's rights, under the Fourth and Fifth Amendments to the Constitution of the United States have been and will be violated unless the Court order the return

of said articles or their exclusion from evidence at the trial of said cause.

WHEREFORE, the defendant prays that the United States Attorney, Marshal, Clerk, and Prohibition Enforcement Officers be notified and the Court direct and order said United States Attorney, Marshal, Clerk and Prohibition Officers either to return said property, destroy same or exclude same and all knowledge derived from same from the trial of said cause.

GUISEPPI TEMPERANI,
Petitioner.

EDWARD A. O'DEA,
Attorney for Petitioner.

VERIFICATION.

State of California,
City and County of San Francisco,—ss.

Joseph Temporani, being first duly sworn, deposes and says: That he is the defendant and the petitioner named in the above-entitled action; that he has read the foregoing petition for the return of property unlawfully seized and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters, that he believes it to be true.

GUISEPPI TEMPERANI.

Subscribed and sworn to before me this 7th day of March, 1923.

[Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of
San Francisco, State of California. [13]

STIPULATION.

It is hereby stipulated by and between counsel for the above-mentioned parties that the above-mentioned motion may be heard without further notice from either party on the 19th day of March, 1923, at the hours of 10 o'clock A. M.

JOHN T. WILLIAMS,
United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

Dated: March, 7th, 1923.

[Endorsed]: Filed Mar. 7, 1923. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOE TEMPERANI,
Defendant.

Answer to Petition for Return of Property and Exclusion of Evidence.

Comes now the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff and Samuel F.

Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of the petitioner herein, denies and alleges as follows:

Denies that all of the said premises was the *bona fide* dwelling of the petitioner, but alleges the fact to be that the garage or basement referred to was at all of the times in petitioner's petition mentioned a distillery or shop where illicit and contraband intoxicating liquor, to wit, jackass brandy, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, was by the said defendant, Joe Temperani manufactured for beverage purposes in violation of Title II of the Act of October 28, 1919, to wit, the National Prohibition Act. Denies that the entry into the said garage or basement by said Prohibition officers or either or any of them was illegal or unlawful or in violation of the Fourth or Fifth Amendments to the Constitution of the United States of America, and,

Denies that the search for and seizure of the said personal property mentioned and described in petitioner's petition herein was or is illegal or unlawful, and in this connection alleges the facts to be as set forth in the affidavit of W. Laumeister hereto attached made a part hereof and marked Exhibit "A," to all intents [15] and purposes to the same effect as if set out herein in full.

WHEREFORE respondent prays that said petition be denied.

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Asst. U. S. Attorney.
Attorneys for Plaintiff. [16]

Exhibit "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JOE TEMPERANI,
Defendant.

AFFIDAVIT IN OPPOSITION TO PETITION
FOR RETURN OF PROPERTY AND EX-
CLUSION OF EVIDENCE.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. Laumeister, being first duly sworn, deposes and says: that he is, and at all of the times herein mentioned was a Federal Prohibition Agent, and acting as such under the Federal Prohibition Director for the State of California, to wit, Samuel F. Rutter.

That the premises at No. 354 Orazabo Street in the City and County of San Francisco, State of California, is a one-story building with a garage underneath; that the opening to the garage is from the said Orazabo Street, which said garage is disconnected from the other portion of the building in that there is no ingress or egress from the said garage into the building above the said garage; that prior to the first day of December, 1922, affiant, together with Prohibition Agent E. A. Powers, had reliable information that there was intoxicating liquor being manufactured, and sold from the said garage. That thereafter, and upon the first day of December, 1922, affiant together with the other Prohibition Agent, were near the premises, to wit, No. 354 Orazabo Street, said city and county, and affiant by his sense of smell discovered the odor of intoxicating liquor, to wit, jackass brandy, and the odor of cooking mash, to wit, mash used in the manufacture of intoxicating liquor, coming from the said garage, and following the said odor affiant and said other Prohibition Agent entered the said garage and then and there found therein, three 20-gallon stills in full operation, that is to say, three stills used [17] in the manufacture of intoxicating liquor, to wit, jackass brandy, the said stills being then and there property designed for the manufacture of intoxicating liquor, to wit, jackass brandy, containing one-half of one percentum and more of alcohol by volume and fit for use for beverage purposes. And in addition thereto, affiant and the other Prohibition Agent found three coal-oil

stoves lighted ad burning underneath the said stills, one hydrometer, 1500 gallons of mash, to wit, the kind of mash used in the manufacture of intoxicat-liquor, to wit, jackass brandy, and 25 gallons of intoxicating liquor, to wit, jackass brandy containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and affiant and said other Prohibition Agent then and there seized the above-mentioned property and the same is now in the possession of the Federal Prohibition Director for the State of California, to wit, Samuel F. Rutter.

That thereafter the said defendant, J. Temperani, stated to affiant that the said stills and the property hereinbefore mentioned belonged to him and that he was manufacturing the said intoxicating liquor. That thereafter, and on the said first day of December, 1922, affiant arrested the said defendant J. Temperani and filed an information charging the said defendant with having in his possession property designed for the manufacture of intoxicating liquor, to wit, three 20-gallon stills, three coal oil-stoves, 1 hydrometer, and 1500 gallons of mash being the kind of mash used in the manufacture of intoxicating liquor, and with the possession of the said property, and with the manufacture of intoxicating liquor, to wit, twenty-five gallons of jackass brandy then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and which said action is now pending in the above-entitled court. That the said defendant at the time of the manufacture of the

said intoxicating liquor had no permit to manufacture the same or to have the said or any intoxicating liquor in his possession. [18]

That affiant did not nor did the other Prohibition Agent at any time enter any of the residential portion of the said building but confined their entrance and their search and seizure to the said property hereinbefore described which was in the garage as hereinbefore set out, and that the entrance to the said garage was not made by the said affiant or any other Prohibition Agent through any portion of the said building located above and over the said garage.

That affiant at all of the times herein mentioned was and is familiar with the odor of cooking mash, to wit, mash used in the manufacture of intoxicating liquor, and with the odor of intoxicating liquor, to wit, jackass brandy, manufactured by the distillation of mach and containing one-half of one per centum and more of alcohol by volume and fir for use for beverage purposes. That at all of the times herein mentioned said liquor was illicit and contraband.

W. LAUMEISTER.

Subscribed and sworn to before me March 20, 1923.

[Seal]

C. W. CALBREATH,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 20, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[19]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of March, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this Court.

No. 12,554.

UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

Minutes of Court—March 26, 1923—Order Submitting Motion for Return of Property and Motion to Exclude Evidence.

This case came on regularly for hearing of motion for return of certain property seized in connection with this case, also for hearing of motion to exclude evidence. After hearing E. A. O'Dea, Esq., Attorney for defendant, and B. F. Geis, Esq., Asst. U. S. Atty., the Court ordered said matters submitted. [20]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 28th day of March, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this Court.

No. 12,554.

UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

Minutes of Court—March 28, 1923—Order Denying Motion for Return of Property and Motion to Exclude Evidence.

Pursuant to oral opinion this day rendered, it is ordered that the motion for order for return of certain property seized in connection with this case and to exclude same from the evidence be and the same is hereby overruled and denied. [21]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 2d day of May in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable WILLIAM C. VAN FLEET, District Judge.

No. 12,554.

UNITED STATES OF AMERICA

vs.

JOE TEMPARANI.

Minutes of Court—May 2, 1923—Record of Trial.

This case came on regularly this day for trial of defendant, Joe Temperani, upon information filed herein. Said defendant was present with his attorney, E. A. O'Dea, Esq. G. J. Fink, Esq., Asst. U. S. Atty. was present for and on behalf of the United States. Upon calling of case, all parties answering ready for such trial, the Court ordered that the same do proceed and that the jury-box be filled from the regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been duly called by lot, sworn, examined and

accepted, were duly sworn to try the issues herein, viz.:

George H. Croley.	George Dias.
Herbert P. Blanchard.	Jos. M. O'Malley.
Clayton P. Smith.	John W. King.
John H. Masterson.	A. E. Berg.
H. M. Schmidt.	W. H. Blanchard.
C. D. Carman.	Walter E. McGuire.

Thereupon Mr. O'Dea moved the Court for order and presented petition for return of property and exclusion of evidence. After hearing Mr. O'Dea and Mr. Fink, the Court ordered said motion and petition denied and to which order Mr. O'Dea, on behalf of defendant, entered an exception.

Mr. Fink called Edward A. Powers and F. D. Stribling, each of whom was sworn as a witness on behalf of the United States and examined, and introduced in evidence parts of three [22] stills, which were filed and marked U. S. Exhibit No. 1, and rested.

Mr. O'Dea thereupon moved the Court for order instructing jury to return verdict of not guilty and, after hearing Mr. O'Dea, the Court ordered said motion denied and to which order Mr. O'Dea on behalf of defendant entered an exception.

Mr. O'Dea then called the defendant, Joe Temparani, who was duly sworn and examined, through Interpreter H. Nespoli, who was duly sworn as such, and rested case on behalf of defendant.

Mr. Fink then recalled Edward A. Powers and F. D. Stribling, who were further examined on behalf of the United States, and introduced in evi-

dence on behalf of the United States a bottle and contents which were filed and marked U. S. Exhibit No. 2, and rested.

Mr. O'Dea thereupon, on behalf of defendant, moved the Court for order instructing jury to return verdict of not guilty, which motion the Court ordered denied and to which order exception was entered.

The case was then argued by Mr. O'Dea and Mr. Fink and submitted, whereupon the Court proceeded to instruct the jury herein, who, after being so instructed, retired at 3:20 P. M., to deliberate upon a verdict, and subsequently returned into Court at 3:25 P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present, and in answer to question of the Court stated they had agreed upon a verdict and presented a written verdict which the Court ordered filed and recorded, viz.:

“We, the jury, find Joe Temperani, the defendant at the Bar, guilty as charged.

CLAYTON P. SMITH,

Foreman.”

Thereupon the Court ordered that the jurors be discharged from further consideration of this case and from attendance upon the Court until May 3, 1923, at 11 A. M. Further ordered that Juror Jos. O'Malley be excused until May 4, 1923, and Walter E. [23] McGuire excused until May 10, 1923.

After hearing attorneys, the Court ordered matter of judgment continued to May 5, 1923, and that defendant go at large upon bond given for his appearance herein. [24]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

THE UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

Verdict.

We, the jury, find Joe Temperani, the defendant at the bar, guilty as charged.

CLAYTON P. SMITH,

Foreman.

[Endorsed]: Filed May 2, 1923, at 3 o'clock and 25 minutes P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [25]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Motion for New Trial.

Now comes Joe Temperani, defendant in the

above-entitled cause, and by Edward A. O'Dea, Esq., his attorney, moves the Court to set aside the verdict rendered herein and to grant a new trial of said cause and for reasons therefor, shows to the Court the following:

I.

That the verdict in said cause is contrary to law.

II.

That the verdict in said cause was not supported by the evidence in the case.

III.

That the evidence in said cause was insufficient to justify said verdict.

IV.

That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial which errors were duly excepted to.

V.

That the Court, upon the trial of said cause, admitted incompetent evidence offered by the United States of America.

Dated at San Francisco, California, this 7th day of May, 1923.

GUISEPPI TEMPERANI,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant. [26]

Due service of the within motion for new trial is hereby admitted this 5th day of May, 1923.

GROVE J. FINK,

United States Attorney.

[Endorsed]: Filed May 7, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[27]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Motion in Arrest of Judgment.

Now comes the defendant, Joe Temperani, and respectfully moves the Court to arrest and withhold judgment in the above-entitled cause and that the verdict of conviction of said defendant heretofore given and made in the said cause be vacated and set aside and declared to be null and void for each of the following causes and reasons:

I.

That Count I of the information filed herein does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

II.

That Count II of the information filed herein does not charge or state facts sufficient to constitute a

public offense under the laws of the United States against this defendant.

III.

That Count III of the information filed herein does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

IV.

That this Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that Counts I, II and III of the information on file herein do not state public offenses under the laws of the United States.

WHEREFORE, by reason of the premises the defendant prays this Honorable Court that the judgment herein be arrested and [28] withheld and that the conviction of the defendant be declared null and void.

GUISEPPI TEMPERANI,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant.

Due service of the within motion in arrest of judgment is hereby admitted this 5th day of May, 1923.

GROVE J. FINK,

United States Attorney.

[Endorsed]: Filed May 7, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[29]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 7th day of May, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable WILLIAM C. VAN FLEET, District Judge.

No. 12,554.

UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

**Minutes of Court—May 7, 1923—Order Overruling
Motion for New Trial and Motion in Arrest of
Judgment.**

This case came on regularly this day for pronouncing of judgment upon defendant, Joe Temperani, who was present in court with his attorney, E. A. O'Dea, Esq. K. M. Green, Esq., Special Asst. U. S. Atty., was present for and on behalf of the United States.

Mr. O'Dea presented motion for new trial and motion in arrest of judgment. Said matters were argued and submitted, and after due consideration had thereon, the Court ordered that both of said motions be and the same are hereby denied, to which order an exception was entered.

Thereupon, no sufficient cause appearing why judgment should not be pronounced, the Court or-

dered that said defendant Joe Temperani, for offense of which he stands convicted, as to First Count, pay a fine in sum of \$250.00; as to Second Count, pay a fine in sum of \$250.00; and as to Third Count, defendant be imprisoned for period of 6 months in County Jail, county of San Francisco, State of California. Further ordered that said defendant stand committed to custody of U. S. Marshal to execute said judgment, and that a commitment issue.

On motion of Mr. O'Dea and with consent of Mr. Green, further ordered that supersedeas bond on appeal be fixed in sum of \$2,000.00. [30]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

THE UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

Judgment on Verdict of Guilty.

Kenneth M. Green, Esq., Assistant United States Attorney, and the defendant with his counsel came into Court. The defendant was duly informed by the Court of the nature of the Information filed on the 3d day of January, 1923, charging him with the crime of violation National Prohibition Act; of his arraignment and plea of Not Guilty; of his trial

and the verdict of the jury on the 2d day of May, 1923, to wit:

“We, the jury, find Joe Temperani, the defendant at the bar, guilty as charged.

CLAYTON P. SMITH,

Foreman.”

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment; THAT, WHEREAS, the said Joe Temperani having been duly convicted in this Court of the crime of violation National Prohibition Act,—

IT IS THEREFORE ORDERED AND ADJUDGED that the said Joe Temperani pay a fine in the sum of Two Hundred Fifty (\$250.00) Dollars as to the first count of the Information; pay a fine in the sum of Two Hundred Fifty (\$250.00) Dollars as to the second count, and be imprisoned for the period of six (6) months in the San Francisco County Jail as to the third count of the Information.

Judgment entered this 7th day of May, A. D. 1923.

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Endorsed]: Entered in Vol. 14, Judg. and Decrees, at page 398. [31]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

UNITED STATES OF AMERICA

vs.

JOE TEMPERANI.

Clerk's Certificate to Judgment-roll.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and seal of said District Court this 7th day of May, 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [32]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Petition for Writ of Error and Supersedeas.

Now comes Joe Temperani, defendant herein, by Edward A. O'Dea, Esq., his attorney, and says that on the 7th day of May, 1923, this Court rendered judgment herein against the defendant in which judgment and the proceedings had prior thereto in this cause, certain errors were permitted to the prejudice of the defendant all of which will more fully appear from the *Aggignment* of Errors which is filed with this petition.

WHEREFORE the defendant prays that a Writ of Error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that a transcript of the record in this cause, duly authenticated, may be sent to the Circuit Court of Appeals, aforesaid, and that this defendant be awarded a supersedeas upon said judgment and all necessary and proper process including bail.

GUISEPPI TEMPERANI,
Defendant.

EDWARD A. O'DEA,
Attorney for Defendant.

Due service of the within petition for writ of error and supersedeas is hereby admitted this 7th day of May, 1923.

JOHN T. WILLIAMS,
United States Attorney.
By GROVE J. FINK,
Asst. U. S. Atty.

[Endorsed]: Filed May 7, 1923. Walter B. Mal-
ling, Clerk. By C. W. Calbreath, Deputy Clerk.
[33]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Assignment of Errors.

Joe Temperani, defendant in the above-entitled cause, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a writ of error to this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence entered in said cause against Joe Temperani, now makes and files with his said petition the following assignment of errors herein, upon which he will apply for a reversal of said judgment and sentence upon the said writ, and which said errors and each of them, are to the great detriment, injury and prejudice of the said defendant and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof

in the District Court of the United States, for the Northern District of California, there is manifest error in this, to wit:

I.

The Court erred in denying the motion made by the defendant and plaintiff in error before the trial of said cause to return and exclude from evidence certain property and knowledge seized from the basement of the home of the defendant by Federal agents as a result of a search and seizure without any search-warrant and without authority of law and in violation of defendant's rights under the Fourth and Fifth Amendments to the United States Constitution.

II.

The Court erred in denying the motion made by the defendant and plaintiff in error at the trial of said cause and after the impanelment of the jury and before the taking of evidence to [34] return to defendant and exclude from evidence property and knowledge obtained by Federal Prohibition Enforcement Officers as a result of a search and seizure from the home of the defendant, to wit, the basement thereof without any search-warrant, and without authority of law and in violation of defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States, to which ruling the defendant and plaintiff in error duly excepted.

III

The Court erred in denying defendant's and plaintiff in error's motion that the following testi-

mony be stricken out. In response to the question asked Witness Powers for the Government by the Court: Q. I say, had you information? A. Yes, your Honor. I seized several stills of his since at another place. To which ruling defendant and plaintiff in error duly excepted.

IV.

The Court erred in denying the motion of the plaintiff in error, the defendant in this case, to strike out all of the evidence given by Witness Powers upon the ground that said evidence was immaterial, irrelevant and incompetent and was all secured in violation of the defendant's rights guaranteed him by the Fourth and Fifth Amendments to the Constitution of the United States. The substance of said evidence was that Prohibition Enforcement Agents Powers and Laumeister, upon information received from Police Sergeant Tutenberg of the Ingleside Police Station that a still was being operated at the basement of defendant's and plaintiff in error's home. Powers admitted that the information mentioned was the primary reason for his going to defendant's place. Powers said that he could smell liquor a half block away but did not know which of two houses, smell emanated from. Powers going first to the front door of said basement, which he and the Court at times call the garage, finding same locked, without a search-warrant, he went to the door at the side of defendant's residence, opened same, went through an alley to the rear of defendant's premises and without [35] a search-warrant or other authority broke the rear door to said

basement and found therein certain property and liquor and three stills which he claims were in operation, Powers said basement was directly under the place where the defendant and his wife and children ate and slept; that in said basement there was some food. To said ruling on said motion, defendant and plaintiff in error duly excepted.

V.

The Court erred in admitting in evidence three copper stills over the objection of the defendant that they were immaterial, irrelevant and incompetent and taken from the defendant in violation of his constitutional rights. To which ruling, the defendant and plaintiff in error duly excepted.

VI.

The Court erred in overruling the objection made by the defendant and plaintiff in error to the introduction of a bottle of distilled spirits identified by Government Witness Powers and testified to by Government Chemist Stribling to contain 48 and a fraction per cent of alcohol by volume. The objection was made that it was immaterial, irrelevant and incompetent and was not properly identified by Agent Powers, and was taken in violation of the defendant's constitutional rights. To which ruling, defendant and plaintiff in error duly excepted.

VII.

The Court erred in admitting the following testimony over the objection of defendant upon the ground that it was incompetent, irrelevant and immaterial and not proper cross-examination, the defendant having been placed on the stand for a lim-

ited purpose, to wit, to prove that he resided with his wife and family at the place set forth in the information. Defendant was on the stand.

The COURT.—Ask him how they got there—what he told the officers if anything about them.

Mr. O'DEA.—We will object to that question as immaterial, irrelevant and incompetent, and not proper cross-examination. [36]

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

A. He says he brought them there.

Mr. FINK.—Was there any jackass there?

Mr. O'DEA.—We will object to that, because there is no evidence here that there was any jackass brandy.

Mr. FINK.—We have assured the Court we will show that.

Mr. O'DEA.—He has not any right to establish his case by the defendant, against the defendant himself.

The COURT.—He has a right to ask this defendant about anything connected with the transaction, because he has opened up the subject.

Mr. O'DEA.—We just put him on the stand for one purpose.

The COURT.—Won't you accept the ruling of the Court—

Mr. O'DEA.—I will take an exception.

Mr. FINK.—Q. Was there any jackass brandy in quantity, about 25 gallons, there on that date?

Mr. O'DEA.—We will object to that on the same grounds as before, not proper cross-examination.

The COURT.—The same ruling.

Mr. FINK.—Q. Was there any jackass brandy, in quantity about 25 gallons, there on that date?

Mr. O'DEA.—We will object to that on the same grounds as before, not proper cross-examination.

The COURT.—The same ruling.

Mr. O'DEA.—Immaterial, irrelevant and incompetent.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

A. "He says he does not believe there was."

Mr. FINK.—Q. He does not believe. Ask him if he knows.

I object to that question on the same grounds as not proper cross-examination, and this is the defendant.

The COURT.—Overruled.

Mr. O'DEA.—Exception. [37]

A. "He says he does not know."

Mr. FINK.—Q. There may have been.

Mr. O'DEA.—We will object to that on the same grounds, and on the further ground that the defendant has already answered the question.

The COURT.—Ask him the question whether the stills were in operation.

Mr. FINK.—Q. Were the stills in operation on December 1, 1922?

Mr. O'DEA.—The same objection, if your Honor please.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

A. "He says he does not know." "He says he went away in the morning, and he does not know if the stills were going or not."

Mr. FINK.—Were the stills in operation when you returned to the house and the officers were there on December 1, 1922?

Mr. O'DEA.—I make the same objection.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

A. "He says when he got there the stills were in the same condition as they are now. He says they stopped him half a block before he got to the house; he says they handcuffed him half a block away from the house before he got there."

Mr. FINK.—They were not in operation then at the time he got there?

Mr. O'DEA.—I will object to that question on the same grounds, and on the further ground that it has already been asked and answered.

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

A. "He says when they got him half a block away and brought him there the stills were in the same condition as they are now." [38]

Mr. FINK.—Q. Were there three coal-oil stoves there?

Mr. O'DEA.—We will object to that on the grounds heretofore stated, and on the further ground that this is the first mention of coal-oil stoves; there was nothing said about it on the prosecution's case in chief, and it is not an issue in this case.

The COURT.—The objection is overruled. He has a perfect right to go into the whole subject.

Mr. O'DEA.—Exception.

A. "He says there were."

Mr. FINK.—Q. Were these stoves lit when you got to the premises?

The COURT.—Burning, you mean?

Mr. FIND.—Yes.

Mr. O'DEA.—We will object to that question, also, if your Honor please.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

A. "No."

Mr. FINK.—Q. Was there a hydrometer in the basement in connection with the rest of the material?

Mr. O'DEA.—We will object to that also.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

A. "He says when they arrested him they took him in the place and he glanced around and saw the condition of the place, and could not specify whether there were any particular things, all he seen was the things were upset—the stills were broken, and they took him right away."

VIII.

The Court erred in denying the motion of defendant and plaintiff in error made at the conclusion of the evidence offered by the defendant and plaintiff in error, that all of the evidence taken in this case be excluded on the ground that it was [39] taken in violation of the defendant's constitutional

rights. To which ruling, the defendant, and plaintiff in error duly excepted.

IX.

The Court erred in denying the motion of the defendant and plaintiff in error for a directed verdict of not guilty, made at the conclusion of the Government's case, upon the grounds first that the evidence is insufficient to sustain the charge and second, that all the evidence in the case taken in violation of the defendant's constitutional rights. To which ruling, the defendant and plaintiff in error duly excepted.

X.

The Court erred in denying the motion of the defendant and plaintiff in error for a directed verdict of not guilty, made at the conclusion of the defendant's case, upon the grounds that the evidence is insufficient for the reason that whatever evidence was taken, was taken in violation of the defendant's constitutional rights. To which ruling defendant duly excepted.

XI.

The Court erred in denying the motion of the defendant and plaintiff in error for a directed verdict of not guilty, made at the conclusion of all the evidence offered by either party in said cause, upon the grounds that the evidence is insufficient to sustain a conviction on any of the counts, and on the further ground that all of the evidence offered by the Government and admitted in evidence, was taken in violation of the defendant's constitutional rights. To which ruling defendant duly excepted.

XII.

The Court erred in denying the motion for a new trial on behalf of the defendant and plaintiff in error, in this

(1) That the verdict in said cause is contrary to law.

(2) That the verdict in said cause is not supported by the evidence in the case.

(3) That the evidence in said cause is insufficient to justify said verdict. [40]

(4) That the Court erred upon the trial of the cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

(5) That the Court, upon the trial of said cause, admitted incompetent evidence offered by the United States of America. To which ruling the defendant duly excepted.

XIII.

The Court erred in denying the motion in arrest of judgment on behalf of the defendant and plaintiff in error, in this

(1) That count I of the information filed herein does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

(2) That count II of the information filed herein does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

(3) That count III of the information filed herein does not charge or state facts sufficient to constitute

a public offense under the laws of the United States against this defendant.

(4) That the Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that counts I, II and III of the information on file herein do not state public offenses under the laws of the United States. To which ruling defendant and plaintiff in error duly excepted.

GUISEPPI TEMPERANI,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant.

Due service of the within assignment of errors is hereby admitted this 7th day of May, 1923.

JOHN T. WILLIAMS,

United States Dist. Attorney.

By GROVE J. FINK,

Asst. United States Dist. Atty. [41]

[Endorsed]: Filed May 7, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [42]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Order Allowing Writ of Error and Supersedeas.

The writ of error and the supersedeas herein prayed for by Joe Temperani, defendant and plaintiff in error, pending the decision upon said writ of error, is hereby allowed and the defendant is admitted to bail upon the writ of error in the sum of Two Thousand and no/100 (\$2,000.00) Dollars.

The bond for costs of the writ of error is hereby fixed at Two Hundred Fifty and no/100 (\$250.00) Dollars for defendant.

Dated at San Francisco, California, this 7th day of May, 1923.

WM. C. VAN FLEET,
United States District Judge.

Due service of the within order allowing writ of error and supersedeas is hereby admitted this 7th day of May, 1923.

JOHN T. WILLIAMS,
United States Attorney.
By GROVE J. FINK,
Asst. U. S. Attorney.

[Endorsed]: Filed May 7, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[43]

(Cost Bond on Appeal.)

12,554.

KNOW ALL MEN BY THESE PRESENTS,
That we, Joe Temperani as principal, and National

Surety Company, as sureties, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty (\$250) Dollars, to be paid to the said United States of America, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of May, in the year of our Lord one thousand nine hundred and twenty-three.

WHEREAS, lately at a District Court of the United States for Southern Division the Northern District of California, First Division, in a suit depending in said court, between United States of America vs. Joe Temperani, #12554, a judgment of conviction and sentence was rendered against the said Joe Temperani and the said Joe Temperani having obtained from said Court a writ of error to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Joe Temperani shall prosecute his Writ of Error to effect, and answer all damaged and costs if he shall fail to make his plea good, then the above obliga-

tion to be void; else to remain in full force and virtue.

J. TEMPERANI. (Seal)

NATIONAL SURETY COMPANY. (Seal)

By C. T. HUGHES, (Seal)

Its Attorney in Fact. (His Seal)

Acknowledged before me the day and year first above written.

FRANCIS KRULL. [44]

(Signed) FRANCIS KRULL, (Seal)

U. S. Commissioner Northern District of California at S. F.

[Endorsed]: Filed May 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[45]

(Bond to Appear on Writ of Error.)

12,554.

United States of America,
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS,
That we, Joe Temporani as principal, and National Surety Company and ————— as sureties, are held and firmly bound unto the United States of America, in the sum of Two Thousand (\$2,000) Dollars, to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents. SEALED

WITH our seals and dated the 7th day of May, in the year of our Lord, one thousand nine hundred and twenty-three:

THE CONDITION of the above recognizance is such, that, whereas, an Information has been filed by the United States Attorney on the 3d day of January, A. D. 1923, in the Southern Division of the United States District Court for the Northern District of California, charging the said Joe Temporani with a violation of the Act of Congress approved October 28, 1919, and known as the National Prohibition Act, committed on or about the 1st day of December, A. D. 1922, to wit: at the district and division aforesaid; thereafter judgment and sentence was made, rendered and entered and writ of error allowed;

AND WHEREAS, the said Joe Temporani has been required to give a recognizance, with sureties, in the sum of Two Thousand (\$2000) Dollars for his appearance before said United States District Court whenever required pending proceeding on writ of error.

NOW, THEREFORE, If the said Joe Temporani shall personally appear at the U. S. Circuit Court of Appeals, Ninth Judicial Circuit, Southern Division of the United States District Court for the Northern District of California, First Division, to be [46] holden at the courtrooms of said courts in the city and county of San Francisco, on the when required, A. D. 192—, at ten o'clock in the forenoon of that day, and afterwards whenever or wherever he may be required to answer the said

charge and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said courts without leave first obtained, and if shall appear for judgment and render himself in execution thereof, then this recognizance shall be void, otherwise, to remain in full effect and virtue.

JOE TEMPERANI, (Seal)

Address 2440 Jones St., S. F.

NATIONAL SURETY COMPANY. (Seal)

[Corporate Seal] By C. T. HUGHES,

Its Attorney in Fact. (Seal)

Acknowledged before me and approved the day and year first above written.

FRANCIS KRULL, (Seal)

United States Commissioner for the Northern District of California, at S. F.

Name and address of attorney for defendant:

EDW. O'DEA Address: Phelan Bldg., S. F.

[Endorsed]: Filed May 8, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.

[47]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

**Stipulation and Order Extending Time to and
Including June 16, 1923, to Lodge and Settle
Bill of Exceptions.**

It is hereby stipulated by and between counsel
for the above-mentioned parties that the defendant
may have to and including the 16th day of June,
1923, in which to lodge and settle his proposed bill
of exceptions upon order allowing a writ of error to
the United States Circuit Court of Appeals, in and
for the Ninth Circuit.

Dated this 17th day of May, 1923.

JOHN T. WILLIAMS,
United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

So ordered.

Dated this 17th day of May, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed May 17, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[48]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

**Stipulation and Order Extending Time to and
Including June 30, 1923, to Lodge and Settle
Bill of Exceptions.**

It is hereby stipulated by and between counsel for the above-mentioned parties that the defendant may have to and including the 30th day of June, 1923, in which to lodge and settle his proposed bill of exceptions upon order allowing a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated this 16th day of June, 1923.

JOHN T. WILLIAMS,
United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

So ordered.

Dated this 16th day of June, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Jun. 16, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[49]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

**Stipulation Extending Time in Which to Lodge
and Settle Defendant's Proposed Bill of
Exceptions to the July, 1923, Term.**

It is hereby stipulated by and between counsel for the above-mentioned parties that the defendant may have to and including the 28th day of July, 1923, in which to lodge and settle his proposed bill of exceptions upon a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit.

It is hereby further stipulated that the time to lodge and settle the bill of exceptions of said de-

fendant upon writ of error herein be extended and continued from the present March, 1923, term to and into the next succeeding, July, 1923, term of this court.

Dated this 29th day of June, 1923.

JOHN T. WILLIAMS,
United States Attorney.
EDWARD A. O'DEA,
Attorney for Defendant.

So ordered.

Dated this 29th day of June, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Jun. 29, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[50]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

**Stipulation and Order Extending Time to and
Including August 27, 1923, to Settle and Present
Bill of Exceptions.**

It is hereby stipulated by and between counsel

for the above-mentioned parties that the defendant may have to and including the 27th day of August, 1923, in which to settle and present his bill of exceptions, upon a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit.

It is hereby further stipulated that by order of the Court made and entered on the 29th day of June, 1923, that the time to settle said bill of exceptions had been extended and continued from the March term into the next succeeding July term of this Court.

Dated this 27th day of July, 1923.

JOHN T. WILLIAMS,

United States Attorney.

EDWARD A. O'DEA,

Attorney for Defendant.

So ordered.

Dated this 28 day of July, 1923.

JOHN S. PARTRIDGE,

United States District Judge.

[Endorsed]: Filed Jul. 28, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[51]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that heretofore, the United States Attorney, in and for the Northern District of California, did file in the above-entitled court an information against the defendant, Joe Temperani, and that, thereafter, the said Joe Temperani appeared in court and upon being called to plead to said information pleaded not guilty as shown by the records herein,

AND BE IT FURTHER REMEMBERED, That the defendant, Joe Temperani, who will hereafter be called the defendant, having duly pleaded not guilty and the cause being at issue, the same coming on for trial on Wednesday, the 2d day of May, 1923, before the Honorable William C. Van Fleet,¹ District Judge of said court, and a jury duly impaneled, the United States being represented by Grove L. Fink, Esq., Assistant United States Attorney, and the defendant being represented by Edward A. O'Dea, Esq.:

That before said cause came to issue and on the 7th day of March, 1923, the defendant filed a motion for the return of property and exclusion of evidence; said motion is in the words and figures as follows, to wit: [52]

“In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Motion to Return Property and to Exclude Evidence.

To the Honorable, the Above-entitled Court:

The petition of Joseph Temperani respectfully shows: That he was arrested on the 1st day of December, 1922, and charged with violating the ‘National Prohibition Law’ and that an information charging him with said offense was filed in this court on the 3d day of January, 1923.

That on the 1st day of December, 1922, he and his family resided at 354 Orazabo Street in the city and county of San Francisco, State of California; that said premises consisted of a story dwelling-house; with a basement and a garage underneath said dwelling-house; that said basement was

used for the keeping of the various things necessary for family use; that said basement was in the rear portion of said premises and led into the garage which was in the front portion of same; that to said garage there were double doors, which, on the last-mentioned date, were closed and locked. That in the upper portion of said premises were beds, furniture, food and ordinary things used for maintaining a household, and that all of said premises was a *bona fide* dwelling of the petitioner.

That on last-mentioned date, and while the petitioner was [53] absent from the premises above described Prohibition Enforcement Agents Powers and Laumeister, without asking the permission of the defendant or any of the occupants of the dwelling-house, and without the authorization of any search-warrant or order of Court, and without any warrant for the arrest of defendant and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and without witnessing, before their entry into said premises, any act or acts which could be construed as a violation of the laws of the United States, and without seeing any liquor or property designed for the manufacture of liquor in plain sight and without previously having made a purchase of liquor from said premises and merely on information received from the Ingleside police station, illegally and unlawfully entered said premises by going to the rear of same, opening the rear basement door and walking through said basement into the garage above mentioned, and

they, illegally and unlawfully and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and without the authorization of a search-warrant and in the manner above described proceeded to search said basement and said garage; and as a result of their unlawful and illegal search they, illegally and unlawfully, found in said garage two twenty-gallon stills, three old stoves, one hydrometer, 1500 gallons of mash and 25 gallons of what is called jackass brandy and they, the said federal prohibition enforcement agents, unlawfully and illegally and without the authorization of any search-warrant and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and in the manner above described, seized same and took same away with them against the will of the defendant, without his permission, without warrant or right of law, and they profess to hold the same against the will of your petitioner as evidence of a violation of the law on the part of your petitioner; that said articles are held without process of law and your petitioner is entitled either to [54] to their return or to have them excluded from evidence at the trial of said cause.

That the garage above mentioned was a private garage where the defendant kept his automobile which he used for himself, his wife and children, and was part of the dwelling.

That the prohibition enforcement director, the prohibition enforcement agents, and the United States Attorney propose to use said evidence at

the trial of the above-entitled cause and that by reason thereof, and the facts set forth, the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States have been and will be violated unless the Court order the return of said articles or their exclusion from evidence at the trial of said cause.

WHEREFORE, the defendant prays that the United States Attorney, marshal, clerk and prohibition enforcement officers be notified and the Court direct and order said United States Attorney, marshal, clerk and prohibition officers either to return said property, destroy same or exclude same and all knowledge derived from same from the trial of said cause.

GUISEPPE TEMPERANI,
Petitioner.

EDWARD A. O'DEA,
Attorney for Petitioner.

VERIFICATION.

State of California,
City and County of San Francisco,—ss.

Joseph Temperani, being first duly sworn, deposes and says: That he is the defendant and the petitioner in the above-entitled action; that he has read the foregoing petition and knows [55] the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

GUISEPPE TEMPERANI.

Subscribed and sworn to before me this 7th day of March, 1923.

[Seal]

THOMAS S. BURNS,
Notary Public in and for the City and County of
San Francisco, State of California.

STIPULATION.

It is hereby stipulated by and between counsel for the above-mentioned parties that the above-mentioned motion may be heard without any further notice from either party on the 19th day of March, 1923, at the hour of 10 o'clock A. M.

JOHN T. WILLIAMS,
United States Attorney.

EDWARD A. O'DEA,
Attorney for Defendant.

[Endorsed]: Filed March 7, 1923. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

Received copy, March 7, 1923.

BEN F. GEIS,
Assistant U. S. Attorney."

That to the foregoing petition the United States Attorney filed the following answer: [56]

"In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

**Answer to Petition for Return of Property and
Exclusion of Evidence.**

Comes now the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff and Samuel F. Rutter, as federal prohibition director in and for the State of California, and for answer to the petition of the petitioner herein, denies and alleges as follows:

Denies that all of the said premises was the *bona fide* dwelling of the petitioner, but alleges the fact to be that the garage or basement referred to was at all of the times in petitioner's petition mentioned a distillery or shop where illicit and contraband intoxicating liquor, to wit, jackass brandy, containing one half of one per centum and more of alcohol by volume and fit for use for beverage purposes, was by the said defendant, Joe Temperani, manufactured for beverage purposes in violation of Title II of the Act of October 28, 1919, to wit, the National Prohibition Act. Denies that the entry into the said garage or basement by said prohibition officers or either or any of them was illegal or unlawful or in violation of the Fourth or Fifth Amendments to the Constitution of the United States of America, and, [57]

Denies that the search for and seizure of the said personal property mentioned and described in petitioner's petition herein was or is illegal or unlawful, and in this connection alleges the facts to be

as set out in the affidavit of W. Laumeister hereto attached made part hereof and marked Exhibit "A," to all intents and purposes and to the same effect as if set out herein in full.

WHEREFORE respondent prays that said petition is denied.

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Asst. U. S. Attorney,
Attorneys for Plaintiff."

[Endorsed]: Filed March 20, 1923. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

Exhibit "A."

(Title of Court and Cause.)

**AFFIDAVIT IN OPPOSITION TO PETITION
FOR RETURN OF PROPERTY AND
EXCLUSION OF EVIDENCE.**

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. Laumeister, being first duly sworn, deposes and says: That he is, and at all of the times herein mentioned was a federal prohibition agent, and acting as such under the federal prohibition director for the State of California, to wit, Samuel F. Rutter;

That the premises at No. 334 Orazabo Street in the city and county of San Francisco, State of California, is a one story building with a garage

underneath; that the opening to the garage [58] is from the said Orazabo Street, which said garage is disconnected from the other portion of the building in that there is no ingress or egress from the said garage into the building above the said garage; that prior to the first day of December, 1922, affiant, together with Prohibition Agent E. A. Powers, had reliable information that there was intoxicating liquor being manufactured, and sold from said garage. That thereafter, and upon the first day of December, 1922, affiant together with the other prohibition agent, were near the premises, to wit, No. 354 Orazabo Street, said city and county, and affiant by his sense of smell discovered the odor of intoxicating liquor, to wit, jackass brandy, and the odor of cooking mash, to wit, mash used in the manufacture of intoxicating liquor, coming from the said garage, and following the said odor affiant and said other prohibition agent entered the said garage and then and there found therein, three 20-gallon stills in full operation, that is to say, three stills used in the manufacture of intoxicating liquor, to wit, jackass brandy, the said stills being then and there property designed for the manufacture of intoxicating liquor to wit, jackass brandy, containing one half of one per centum and more of alcohol by volume and fit for use for beverage purposes. And in addition thereto, affiant and the other prohibition agents found three coal-oil stoves lighted and burning underneath the said stills, one hydrometer, 1500 gallons of mash, to wit, the kind of mash used in the manufacture of intoxicating liquor, to wit,

jackass brandy, and 25 gallons of intoxicating liquor, to wit, jackass brandy containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and affiant and said other prohibition agent then and there seized the above mentioned property and the same is now in the possession of the federal prohibition director for the State of California, to wit, Samuel F. Rutter; [59]

That thereafter the said defendant J. Temperani stated to affiant that the said stills and the property hereinbefore mentioned belonged to him and that he was manufacturing the said intoxicating liquor. That thereafter, and on the said first day of December, 1922, affiant arrested the said defendant, J. Temperani, and filed an information charging the said defendant with having in his possession property designed for the manufacture of intoxicating liquor, to wit, three 20-gallon stills, three coal-oil stoves, 1 hydrometer, and 1500 gallons of mash being the kind of mash used in the manufacture of intoxicating liquor, and with the possession of the said property, and with the manufacture of intoxicating liquor, to wit, twenty-five gallons of jackass brandy then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and which said action is now pending in the above-entitled court. That the said defendant at the time of the manufacture of the said intoxicating liquor had no permit to manufacture the same or to have the said or any intoxicating liquor in his possession.

That affiant did not nor did the other prohibition agent at any time enter any of the residential portion of the said building but confined their entrance and their search and seizure to the said property hereinbefore described which was in the garage as hereinbefore set out, and that the entrance to the said garage was not made by the said affiant or any other prohibition agent through any portion of the said building located above and over the said garage.

That affiant at all of the times herein mentioned was and is familiar with the odor of cooking mash, to wit, mash used in the manufacture of intoxicating liquor, and with the odor of intoxicating liquor, to wit jackass brandy, manufactured by the distillation of mash and containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes. [60] That at all of the times herein mentioned said liquor was illicit and contraband.

W. LAUMEISTER.

Subscribed and sworn to before me March 20, 1923.

[Seal]

C. W. CALBREATH,
Deputy Clerk, District Court N. D. C. of California.

That pursuant to said stipulation, said motion came on to be heard on the 19th day of March, 1923, and was continued by order of the Court to the 26th day of March, 1923; on that day the motion was heard by the Court, the Hon. Robert S. Bean presiding, and the Court saw and examined the originals of the above-mentioned verified petition of defendant, the original affidavit of the said W.

Laumeister, and the original answer of plaintiff to the petition, all of which said papers were then on file in the said cause, and after hearing counsel for the above-mentioned parties, the Court ordered said matters submitted and that, thereafter and on the 28th day of March, 1923, the Court made and entered its order denying the motion of the defendant for the return of certain property seized in connection with the case and to exclude same from evidence.

That upon the trial of said cause, and on the 2d day of May, 1923, a jury was duly impaneled and sworn, whereupon the following proceedings were had:

Mr. O'DEA.—If your Honor please, in order to defend the defendant's rights,—the defense is primarily a question of law—I think under the Gouled case, it is my duty when the jury is empaneled, to make this motion again. I tender again the petition to exclude evidence because it was taken from the defendant.

The COURT.—Of course, I did not pass on it. If you tender it you will have to state the purport of it to me.

Mr. O'DEA.—The petition of Joseph Temperani respectfully [61] shows:

“That he was arrested on the 1st day of December, 1922, and charged with violating the ‘National Prohibition Law’ and that an information charging him with said offense was filed in this court on the 3d day of January, 1923;

That on the 1st day of December, 1922, he and his family resided at 354 Orazabo Street in the city and county of San Francisco, State of California; that said premises consisted of a story dwelling-house with a basement and a garage underneath said dwelling-house; that said basement was used for the keeping of the various things necessary for family use; that said basement was in the rear portion of said premises and led into the garage which was in the front portion of same; that to said garage there were double doors which, on the last-mentioned date, were closed and locked. That in the upper portion of said premises were beds, furniture, food and ordinary things used for maintaining a household, and that all of said premises was a *bona fide* dwelling of the petitioner.

That on last-mentioned date, and while the petitioner was absent from the premises above described Prohibition Enforcement Agents Powers and Laumeister, without asking the permission of the defendant or any of the occupants of the dwelling-house, and without the authorization of any search-warrant or order of court, and without any warrant for the arrest of defendant and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and without witnessing, before their entry into said premises, any act or acts which could be construed as a violation of the laws of the United States, and without seeing any liquor or property designed for the manufacture of liquor in plain sight and without previously having made a purchase of liquor from

said premises and merely on information received from the Ingleside police station, illegally and unlawfully entered said premises by going to the rear of same, opening the rear basement door and [62] walking through said basement into the garage above mentioned, and they, illegally and unlawfully and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and without the authorization of a search-warrant and in the manner above described proceeded to search said basement and said garage; and as a result of their unlawful and illegal search they, illegally and unlawfully, found in said garage two twenty-gallon stills, three old stoves, one hydrometer, 1500 gallons of mash and 25 gallons of what is called jackass brandy and they, the said federal prohibition enforcement agents, unlawfully and illegally and without authorization of any search-warrant and in violation of the Fourth and Fifth Amendments of the Constitution of the United States and in the manner above described, seized same and took same away with them against the will of the defendant, without his permission, without warrant or right of law, and they profess to hold the same against the will of your petitioner as evidence of a violation of the law on the part of your petitioner; that said articles are held without process of law and your petitioner is entitled either to their return or to have them excluded from evidence at the trial of said cause.

That the garage above mentioned was a private garage where the defendant kept his automobile

which he used for himself, his wife and children, and was part of the dwelling.

That the prohibition enforcement director, the prohibition enforcement agents, and the United States Attorney propose to use said evidence at the trial of the above-entitled cause and that by reason thereof, and the facts set forth, the defendant's rights, under the Fourth and Fifth Amendments to the Constitution of the United States have been and will be violated unless the Court order the return of said articles or their exclusion from evidence at the trial of said cause.

WHEREFORE, the defendant prays that the United States Attorney, [63] marshal, clerk and prohibition enforcement officers be notified and the Court direct and order said United States Attorney, marshal, clerk and prohibition officers either to return said property, destroy same or exclude same and all knowledge derived from same from the trial of said cause."

Mr. O'DEA.—(Upon the conclusion of the reading of said affidavit.)

"Now, this is not only a violation of the Fourth and Fifth Amendments, but is also in violation of Section 25 of the National Prohibition Act which says, 'No search-warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, a shop, saloon, restaurant, hotel or boarding-house.' "

The COURT.—“Mr. O’Dea, there is no reason why this should not be presented in the usual way. I will hear you after I hear the other side state the facts. What is the showing on behalf of the Government?”

Thereupon Mr. Fink presented the following pleadings:

Mr. FINK.—An affidavit and answer were filed, your Honor, the affidavit of W. Laumeister is as follows:

“W. Laumeister, being first duly sworn, deposes and says: That he is, and at all the times herein mentioned was a federal prohibition agent, and acting as such under the federal prohibition director for the State of California, to wit, Samuel F. Rutter.”

(I will state in an aside that Laumeister is not now connected with the force, but was at the time he made this affidavit.)

“That the premises at No. 334 Orazabo Street in the city and county of San Francisco, State of California, is a one-story building with a garage underneath; that the opening to the garage is from the said Orazabo Street, which said garage is disconnected [64] from the other portion of the building in that there is no ingress or egress from the said garage into the building above the said garage; that prior to the 1st day of December, 1922, affiant, together with Prohibition Agent E. A. Powers, had reliable information that there was intoxicating liquor being manufactured, and sold from the said garage. That, thereafter, and upon the 1st day of December,

1922, affiant together with the other prohibition agent, were near the premises, to wit, No. 354 Orzabo Street, said city and county, and affiant by his sense of smell discovered the odor of intoxicating liquor, to wit, jackass brandy, and the odor of cooking mash, to wit, mash used in manufacture of intoxicating liquor, coming from the said garage, and following the said odor affiant and said other prohibition agent entered the said garage and then and there found therein, three 20-gallon stills in full operation, that is to say, three stills used in the manufacture of intoxicating liquor, to wit, jackass brandy, the said stills being then and there property designed for the manufacture of intoxicating liquor, to wit, jackass brandy, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes. And in addition thereto, affiant and the other prohibition agents found three coal-oil stoves lighted and burning underneath the said stills, one hydrometer, 1500 gallons of mash, to wit, the kind of mash used in the manufacture of intoxicating liquor, to wit, jackass brandy, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and affiant and said other prohibition agent then and there seized the above-mentioned property and the same is now in the possession of the federal prohibition director for the State of California, to wit, Samuel F. Rutter.

That thereafter the said defendant, J. Temperani, stated to affiant that the said stills and the property hereinbefore mentioned [65] belonged to him

and that he was manufacturing the said intoxicating liquor. That thereafter and on the said first day of December, 1922, affiant arrested the said defendant, J. Temperani, and filed an information charging the said defendant with having in his possession property designed for the manufacture of intoxicating liquor, to wit, three 20-gallon stills, three coal-oil stoves, 1 hydrometer, and 1500 gallons of mash being the kind of mash used in the manufacture of intoxicating liquor, and with the possession of the said property, and with the manufacturing of intoxicating liquor, to wit, twenty-five gallons of jackass brandy then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and which said action is now pending in the above-entitled court. That the said defendant at the time of the manufacture of said intoxicating liquor had no permit to manufacture the same or to have the said or any intoxicating liquor in his possession.

That affiant did not nor did the other prohibition agent at any time enter any of the residential portion of the said building but confined their entrance and their search and seizure to the said property hereinbefore described which was in the garage as hereinbefore set out, and that the entrance to the said garage was not made by the said affiant or any other prohibition agent through any portion of the said building located above and over the said garage.

That affiant at all of the times herein mentioned was and is familiar with the odor of cooking mash, to wit, mash used in the manufacture of intoxicat-

ing liquor, and with the odor of intoxicating liquor, to wit, jackass brandy, manufactured by the distillation of mash and containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes. That at all of the times herein mentioned said liquor was illicit and contraband.” [66]

Mr. FINK.—That affidavit was made by Mr. Laumeister.

On March 20, 1923, the answer filed by Mr. Geis is as follows:

“Comes now the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff and Samuel F. Rutter, as federal prohibition director in and for the State of California, and for answer to the petition of the petitioner herein, denies and alleges as follows:

Denies that all of the said premises was the *bona fide* dwelling of the petitioner, but alleges the fact to be that the garage or basement referred to was at all of the times in petitioner’s petition mentioned a distillery or shop where illicit and contraband intoxicating liquor, to wit, jackass brandy, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, was by the said defendant, Joe Temperani, manufactured for beverage purposes in violation of Title II of the Act of October 28, 1919, to wit, the National Prohibition Act. Denies that the entry into the said garage or basement by said prohibition

officers or either or any of them was illegal or unlawful or in violation of the Fourth or Fifth Amendments to the Constitution of the United States of America, and,

Denies that the search for and seizure of the said personal property mentioned and described in petitioner's petition herein was or is illegal or unlawful, and in this connection alleges the facts to be set out in the affidavit of W. Laumeister hereto attached made part hereof and marked Exhibit "A," to all intents and purposes and to the same effect as if set out herein in full.

WHEREFORE, Respondent prays that said petition be denied.

Mr. O'DEA.—I have already cited to your Honor Section 25 of the national prohibition law. Since the national prohibition [67] law went into effect, Congress has imposed penalties upon Government officers who violated the Fourth and Fifth Amendments to the Constitution of the United States, thereby having in consideration the importance of these Amendments, and in order to properly enforce the Fourth and Fifth Amendments of the Constitution of the United States, Congress passed what they called an Act Supplemental to the Prohibition Act, which was approved on November 23, 1921, and is found in Chapter 134 of the Statutes of 1921; Section 6 of said Act, which deals with the point in question, is as follows:

"Any officer, agent or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of

the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who, while so engaged, shall without a search-warrant maliciously and without reasonable cause, search any other building or property, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined for a first offense not more than \$1000, and for a subsequent offense not more than \$1000, or imprisonment for not more than one year, or both such fine and imprisonment."

The COURT.—Mr. O'Dea, you are striking at shadows. If you will just read the designation of a private dwelling as defined in Section 25 of the Prohibition Act, you will see it has nothing to do with this case at all.

Mr. O'DEA.—"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property. [68] A search-warrant may issue as provided in Title II of public law numbered 24 of the 65th Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized, shall be subject to such disposition as the Court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the

Court shall otherwise order. No search-warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding-house."

The COURT.—Exactly.

Mr. O'DEA.—There is no question raised by the pleadings presented by the Government that the upper portion of this place was a private dwelling. Then the question before the Court is whether a basement and garage, the basement being connected with the garage, is to be excluded from the private dwelling. There is no question here that this is not a shop, it is not a store.

The COURT.—Mr. O'Dea, it is idle to discuss this proposition to me. Judge Bean would have been derelict if he had not held exactly as you say he did against your proposition. The Fourth and Fifth Amendments do not undertake to protect the sanctity of any place other than the private dwelling of the citizen. They do undertake to protect that against invasion for the purpose of search or seizure without a search-warrant; but a private dwelling, as defined in Section 25 of the Prohibition Act, as mentioned in the Act of November 21, is premises occupied solely for the purposes of a private dwelling or [69] domicile, and it has no relation to either a dwelling, proper, or any place connected with it which is being used for any purpose. The law would be a travesty if it undertook to protect from search and seizure a place not de-

voted to the purposes of a dwelling, where it was patent that the law was being violated. Officers of the law are not expected to ignore the obvious and the patent, and they are expected to use their senses, and the very purpose of their appointment is the detection and prosecution of violations of this law; and their senses include that of smell, as well as sight and touch, and the other senses with which nature has endowed them. Now, according to the statement uncontradicted, if you will read your petition carefully, you will see that you do not pretend to say that this was not found in the basement, and you do not pretend to say that the garage was connected with the dwelling part.

Mr. O'DEA.—I allege that in my petition.

The COURT.—No, you do not. You say it was a part, but you do not pretend to assert any place that there was an entrance into the garage from the dwelling part, which was occupied as a residence. Now, there is nothing of a subtle nature in defining what shall constitute a part of the dwelling. You cannot, in order to evade this law, introduce stills and other apparatus for the purpose of manufacturing illicit liquor into a part of the premises which is not occupied by the occupant as a dwelling, and expect them to be protected. The law does not contemplate that. It is idle to undertake to apply Section 4 and Section 5 of the Constitution to the protection of a place such as is described here."

EXCEPTION No. 1.

(After further argument the matter was submitted to the Court for its decision.) [70]

The COURT.—The motion will be denied.

Mr. O'DEA.—I would ask for an exception.

That thereafter, the plaintiff, to maintain the issues on its part to be maintained, introduced and offered in evidence the following testimony, to wit:

Testimony of E. A. Powers, for the Government.

E. A. POWERS, called for the United States, being sworn, testified [71] as follows:

Direct Examination.

I am a prohibition agent. I have been engaged in that service six months, since November 1st. I was in that service on December 1, 1922. I live at 1750 Mission Street, San Francisco, California. On December 1, 1922, I saw the defendant, Joe Temperani at Orazabo Street at his home. I have the number here. It is 334 Orazabo Street, San Francisco, California. Another agent, Walter Lau-meister was with me. On that day I received information that Joe Temperani was operating a still in the basement of his residence and we investigated and you could smell it half a block away. You could smell the mash from the stills. We rang the bell upstairs, and there was no answer and we went to the garage and rear and there was no answer and we walked through the rear door.

Mr. O'DEA.—Now, at this time, I object to the answer on the ground that the evidence offered by the witness is incompetent and immaterial.

The COURT.—He is just stating the circumstances.

(Testimony of E. A. Powers.)

Mr. O'DEA.—I think at this time in order to protect the defendant's rights it would be proper for me to ask him if he had a search-warrant.

The COURT.—You may do that on cross-examination, if it becomes material. Proceed.

At this point the witness testified further:

We entered the basement or garage. It was locked. The garage was. To get in, we shoved the door in. We forced the entrance. We found three twenty-gallon stills, in full operation and found a hydrometer and 1500 gallons of mash and twenty-five gallons of jackass brandy. We waited there and about five minutes afterwards the defendant, Temperani, drove up in a Cole car. He stepped from the car, and we asked him if it was his premises [72] and he said "Yes" and we walked into the garage with the defendant and he admitted that they were his stills, and he brought his wife and child down and they admitted they were his stills and Temperani was asked "These are your stills, Temperani?" He said, "Yes. Who told you I was operating?" Of course, we could not tell him that. Three 20-gallon stills were on stoves and were burning and the mash was cooking. The stoves were not full of mash. The boilers were full of mash. The stills were full of mash, and the fire was burning under them; they were operating. It was in process of distillation. Besides the three stills, we found one hydrometer, 1500 gallons of mash and 25 gallons of brandy. We had informa-

(Testimony of E. A. Powers.)

tion that he was running this still; that he was manufacturing.

The COURT.—And selling it?

WITNESS.—Well, I did not find him selling it.

The COURT.—I say, had you information?

WITNESS.—Yes, your Honor, I seized several stills of his since at another place.

EXCEPTION No. 2.

Mr. O'DEA.—I would ask that that be stricken out.

The COURT.—Oh, no.

Mr O'DEA.—The motion is granted?

The COURT.—No.

Mr. O'DEA.—I take an exception.

WITNESS (Continuing).—The statements made by the defendant to me just appertained to the stills, that was all. The jackass brandy was in a sort of container. It dropped from the cooler into the container. He did not say that the jackass brandy belonged to him. He said the stills and apparatus there were his. A sample of the jackass brandy was taken by us. I am able to identify this bottle. That [73] is my handwriting on the bottle. I put the label on the bottle there. The liquor that is in the bottle, I took from the container at 334 Orazabo Street, the premises of the defendant. After I had taken this bottle and had placed a label on it, I took it to the chemist.

On cross-examination, the witness testified as follows:

I did not have a search-warrant to search the

(Testimony of E. A. Powers.)

premises, the premises in which the defendant is accused of having this property. The premises were a one-story building and basement. We entered through the rear into the still room, the basement or garage. It was not a finished basement, there was plenty of room for the car. It was not connected in any way by opening a door on the stairway with the residence, or with the upper or residence part of the building. We had to enter it from the outside. The first information that we received was from Police Sergeant Tutenberg. He is a sergeant at that station. He told me that there was a still being operated in the basement of Temperani's home. I did not ask him the source of the information. Laumeister and I went to these premises because we had the information from the sergeant of the Ingleside police station. That was the primary reason for our going to that place. When we got to that place, we went to the front of same. We could smell it a half block away. We investigated and found the smell came from that particular place. There was a house next door.

Mr. O'DEA.—And you did not detect the odor of the mash until you got to the front door of the garage?

WITNESS.—Within a quarter of a block I could smell it.

Mr. O'DEA.—You could smell it in that neighborhood but you could not tell which of the two

(Testimony of E. A. Powers.)

houses it was in, if you discarded entirely the information you had received? [74]

WITNESS.—You could smell the strong odor, and you could follow the odor.

Mr. O'DEA.—Until you got right there?

WITNESS.—Until you got right there.

WITNESS (Continuing).—We tried the garage door. We did not see any still then. We went to the front door upstairs. I rang the bell. There was no response to my call. Then I walked round to the back door. The place was enclosed by a fence and had a side entrance. I opened the door to the side entrance and walked into the yard and from the yard I tried the door leading into the garage and it would not open, so I shoved it in. The basement and garage are all one place; it was not subdivided off at that time. I broke the door leading into the garage. I could see the stills as soon as the door was opened. I did not go into a rear room, I went directly from the yard into the garage. I did not at any time enter any of the rooms in the dwelling or upper part. I went directly from the yard into where the stills were operating. I did not break any other door to go into the place where the garage was. I did not notice what was in the basement besides the garage for the automobile. I noticed that there was a couple of cases of dried apricots in the basement. I do not remember whether there was any other property there. I did not investigate the property. I did not notice whether there was any garlic or

(Testimony of E. A. Powers.)

dried fish in the basement. I did not notice any other food that might be used in maintaining a household. There were steps leading from the front of the house to the street. The basement and the dwelling-house were on the same lot. The basement formed part of the building. I talked with the defendant's wife in the basement, and I saw a little girl about ten or eleven years of age down there. I was never upstairs at all in the house nor was the agent Laumeister up there in the house.

Mr. O'DEA.—There is no question in your mind that the defendant and his wife and the child resided in those premises?

WITNESS.—No, he admitted as much. [75]

The WITNESS (Continuing).—I have no knowledge that the defendant at that time lived at any other place. I never made a purchase from those premises. When I first went to the premises the defendant, Temperani, was not there, and there was no automobile there. He drove up to the side of the house in a machine, a Cole 8, right alongside of the fence. He stepped out and walked into the basement. First he claimed he did not own it and then he did. There was a letter under the garage door addressed to Guisseppi Temperani. We did not take him into custody before we went into the place. He walked into the place with us. It was a basement that they could store a machine in, plenty of room to store a machine in. I do not know if the machine was kept there. The defend-

(Testimony of E. A. Powers.)

ant told me it was a garage and then he said afterwards that he did not keep his machine in there but kept it elsewhere. The basement was not a finished basement. There was plenty of room for an automobile to drive in and out. There was a large door for driving a machine in there. We did not go through the large door. We entered through the rear.

EXCEPTION No. 3.

Mr. O'DEA.—That is all from this witness. At this time I ask that all of the evidence given by the witness be stricken out on the ground that it is immaterial, irrelevant and incompetent and it was all secured in violation of the defendant's rights guaranteed him by the Fourth and Fifth Amendments to the Constitution of the United States.

The COURT.—The objection is overruled, and the motion is denied.

Mr. O'DEA.—Exception. [76]

On redirect examination, the witness testified as follows:

The three copper receptacles which I am shown are stills for making jackass brandy. I can identify these three copper stills. I have them tagged with the name of the defendant, Temperani, 334 Orazaba Street, December 1, Laumeister and Powers, in my handwriting, those are the three stills that I referred to in my direct examination. They were seized December 1, 1922, at 334 Orazaba

(Testimony of E. A. Powers.)

Street. They were seized by Agent Laumeister and myself. They were in full operation at the time I went there. I dumped the jackass brandy in the sewer. I poured coal oil into the mash I found there.

On recross-examination, the witness testified as follows:

I seized the jackass brandy in the basement. The jackass brandy was running from the cooler into this container. I destroyed 25 gallons. I did not see the defendant in that place manufacture any of this jackass brandy. I saw the material in the process of manufacture, however.

Testimony of F. D. Stribling, for the Government.

F. D STRIBLING, called for the United States, being sworn, testified as follows:

Direct Examination.

I am an internal revenue chemist. I have been such something over two years. I am stationed at 63 Appraiser's Building, San Francisco, California. I have heretofore made examinations of liquid for alcoholic contents. I have made several thousand such examinations. The bottle I am handed has been in my possession. I got it from Agent Powers. Agent Powers brought it in. I made a chemical analysis of the contents of that bottle. I found that it contained distilled spirits commonly known as jackass brandy, and containing 59.75 per cent

(Testimony of F. D. Stribling.)
of alcohol by volume. It was brought in on March 19, 1923.

On cross-examination, the witness testified as follows:

I do not know whether or not this is the liquor which was taken from Orazaba Street. It says, "From Cypress Lawn, San [77] Mateo County."

EXCEPTION No. 4.

Mr. FINK.—I ask at this time that there be introduced in evidence the three copper stills present and identified by the witness.

The COURT.—Let them be considered in evidence.

Mr. O'DEA.—I object to the introduction in evidence of these three copper stills on the ground that they are immaterial, irrelevant and incompetent, and were taken in violation of the defendant's constitutional rights.

The COURT.—Overruled.

Mr. O'DEA.—Exception.

**Testimony of E. A. Powers, for the Government
(Recalled).**

E. A. POWERS, recalled for the United States, testified as follows:

This bottle (referring to bottle marked "Cypress Lawn") was brought by mistake. This was a sample we got the second time we arrested defendant. He has not been tried on that charge yet,

(Testimony of E. A. Powers.)

and by mistake they brought the second bottle, which has "Joe Temperani" on it. There is another bottle of the sample that we took.

Mr. FINK.—That is all. I am prepared to rest, with the request of the Court that I be permitted to produce the proper bottle.

EXCEPTION No. 5.

Mr. O'DEA.—If your Honor please, at this time I move for a directed verdict of not guilty on the ground, (1) that the evidence is insufficient to sustain the charge. On the second ground, that all of the evidence in this case was taken in violation of the defendant's constitutional rights.

The COURT.—The motion will be denied.

Mr. O'DEA.—Exception. [78]

That, thereupon, the defendant, Temperani, to maintain the issues on his part to be maintained, introduced and offered in evidence the following testimony, to wit:

Testimony of Joe Temperani, in His Own Behalf.

JOE TEMPERANI, called in his own behalf, being sworn, testified as follows, through interpreter Hector Nespoli, who was sworn to translate the questions propounded to the defendant from English into Italian and to translate the answers of the defendant, Temperani, from Italian into English:

I am the defendant in this case. On December 1st of last year I lived on Orazaba Street. My

Testimony of Joe Temperani.)

wife and two children live with me. We occupy two rooms upstairs and one downstairs. I had food in the basement. There was a garage in front and it was partitioned off for food for the house. There were steps leading from the back of the place to downstairs in the yard. I and my family would use the back steps to go into the basement or garage or both once or twice and sometimes four or five times a day. Into the rear of the basement there are two doors. There was a door and a partition to go from the little wareroom into the front of the room which was used as a garage. To go from the kitchen to the back yard you will go through the back door and down the steps into the back yard. The kitchen was on the upper floor.

At this point, Mr. O'Dea announced, "That is all."

On cross-examination, the witness testified as follows:

I have been generally going to Alaska every year and from that I worked in a shipyard until I got let off. My occupation on or about December 1, 1922, was pick and shovel work.

EXCEPTION No. 6.

Mr. FINK.—Were these three stills in evidence in the basement of your premises on December 1, 1922? [79]

Mr. O'DEA.—We will object to that on the ground that it is immaterial, irrelevant and in-

(Testimony of Joe Temperani.)

competent, and not proper cross-examination. The defendant was put on the stand for one purpose.

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

WITNESS.—When the men got there they found them in the basement.

Mr. FINK.—And they were there then?

WITNESS.—When they came they found them in the basement.

EXCEPTION No. 7.

The COURT.—Ask him how they got there—what he told the officers, if anything, about them.

Mr. O'DEA.—We will object to that question as immaterial, irrelevant and incompetent, and not proper cross-examination.

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

WITNESS.—He says he brought them there.

EXCEPTION No. 8.

Mr. FINK.—Was there any mash there on December 1, 1922?

WITNESS.—He says there were two barrels.

Mr. FINK.—Was there any jackass brandy there?

Mr. O'DEA.—We will object to that, because there is no evidence here that there was any jack-ass brandy.

Mr. FINK.—We have assured the Court we will show that.

(Testimony of Joe Temperani.)

Mr. O'DEA.—He has not any right to establish his case by the defendant, against the defendant himself.

The COURT.—He has a right to ask this defendant about anything connected with the transaction, because he has opened up the subject. [80]

Mr. O'DEA.—We just put him on the stand for one purpose.

Mr. O'DEA.—I will take an exception.

WITNESS.—He says he does not think there was any at all there.

EXCEPTION No. 9.

Mr. FINK.—Was there any jackass brandy in quantity about 25 gallons there on that date?

Mr. O'DEA.—We will object to that on the same grounds as before, not proper cross-examination, and immaterial, irrelevant and incompetent.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

WITNESS.—He says he does not believe there was.

Mr. FINK.—He does not believe. Ask him if he knows.

Mr. O'DEA.—I object to that question on the same grounds as not proper cross-examination, and this is the defendant.

The COURT.—Overruled.

Mr. O'DEA.—Exception.

WITNESS.—He says he does not know.

(Testimony of Joe Temperani.)

EXCEPTION No. 10.

Mr. FINK.—Were these stills in operation on December 1, 1922?

Mr. O'DEA.—The same objection, if your Honor please. (Not proper cross-examination, incompetent, irrelevant and immaterial.)

The COURT.—The same ruling.

Mr. O'DEA.—Exception. [81]

WITNESS.—He says he does not know. He says he went away in the morning, and he does not know if the stills were going or not.

Mr. FINK.—Were the stills in operation when you returned to the house and the officers were there on December 1, 1922?

Mr. O'DEA.—I make the same objection.

The COURT.—The same ruling.

WITNESS.—He says when he got there the stills were in the same condition as they are now. He says they stopped him half a block before he got to the house; he says they handcuffed him half a block away from the house before he got there.

Mr. FINK.—They were not, then, in operation at the time that he got there?

Mr. O'DEA.—I will object to that question on the same grounds, and on the further ground that it has already been asked and answered.

The COURT.—The objection is overruled.

Mr. O'DEA.—Exception.

WITNESS.—He says when they got him half a

(Testimony of Joe Temperani.)

block away and brought him there the stills were in the same condition as they are now.

EXCEPTION No. 11.

Mr. FINK.—Were there three coal-oil stoves there?

Mr. O'DEA.—We will object to that on the grounds heretofore stated, and on the further ground that this is the first mention of coal-oil stoves; there was nothing said about it on the prosecution's case in chief, and it is not an issue in this case.

The COURT.—The objection is overruled. He has a perfect right to go into the whole subject.
[82]

Mr. O'DEA.—Exception.

WITNESS.—He says there were.

Mr. FINK.—Were these stoves lit when you got to the premises?

The COURT.—Burning, you mean?

Mr. FINK.—Yes.

Mr. O'DEA.—We will object to that question, also, if your Honor please.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

WITNESS.—No.

EXCEPTION No. 12.

Mr. FINK.—Was there a hydrometer in the basement in connection with the rest of this material?

Mr. O'DEA.—We will object to that also.

The COURT.—The same ruling.

Mr. O'DEA.—Exception.

(Testimony of Joe Temperani.)

WITNESS.—He says when they arrested him they took him in the place and he glanced around and saw the condition of the place, but could not specify whether there were any particular things, all he seen was the things were upside down, the stills were broken, and they took him right away.

The WITNESS (Continuing).—On December 1, 1922, I owned the Cole 8 automobile.

That, thereupon, the defendant rested.

EXCEPTION No. 13.

Mr. O'DEA.—That is the defendant's case. At this time I ask again that all of the evidence taken in this case be excluded [83] on the ground that it was taken in violation of the defendant's constitutional rights; and at this time, also, in order to protect the defendant's rights, I will ask a directed verdict on the ground that the evidence is insufficient, for the reason that whatever evidence was taken was taken in violation of the defendant's constitutional rights.

The COURT.—The motion is denied.

Mr. O'DEA.—Exception.

That thereupon the plaintiff, with the permission of the Court, introduced and offered in evidence the following further testimony, to wit:

**Testimony of E. A. Powers, for the Government
(Recalled).**

E. A. POWERS, recalled as a witness for the Government, being sworn, testified as follows:

The bottle I am handed containing liquid I can

(Testimony of E. A. Powers.)

identify. It is the December 1, 1922, bottle. I got the liquid that is in that bottle on Orazaba Street, the premises of the defendant, Joe Temperani. I personally bottled the liquid. After I bottled it I took it to the chemist. It is the sample I thought I was testifying to this morning.

On cross-examination, the witness testified as follows:

This bottle of liquor was taken from the container. The brandy ran from the still in through the condenser to the container. The color of any distilled substance after it leaves the still is whitish. This was taken from the still. This liquid is not white. It is colored. He evidently mixed the coloring matter in that container before he bottled it. To color this liquid, caramel or something [84] like that would have to be dropped into the container. It could be colored immediately after it comes from the still. I don't remember whether I found any coloring matter there or not. I did not put the label on it, Agent Laumeister did. I saw him write on it. After I poured the substance into the bottle I had it with me in my pocket or Laumeister put it in his pocket or we put it in the pocket of the car when we went to the customs-house. I took it out and took it up into the Appraisers Building. I could not say who pasted the tag on the bottle. It is the only sample that was taken from the container. I did not see Laumeister put the tag on it. This bottle looks the same

(Testimony of E. A. Powers.)

as the bottle of stuff that was taken. Outside of the fact that I have the bottle in my hand and it is labelled with Laumeister's name, I would not know whether it was the same or whether any other bottle was the same either. I handed it to one of the chemists. I don't know which one I handed it to. We did not take a receipt for it. I did not put the tag on it. My reason for believing that it is the bottle is because Laumeister's name is on it, and my name is on there too.

On redirect examination, the witness testified as follows:

When two agents are working together one will fill the bottle, and the other write the tag and paste it on. We are in each other's presence all the time.

On recross-examination, the witness testified as follows:

I was in Laumeister's presence that day.

F. D. Stribling, for the Government (Recalled).

F. D. STRIBLING, recalled as a witness for the Government, [85] being sworn, testified as follows:

This bottle containing liquid has been in my possession. I don't know to whom it was delivered. I know, by our records, that Agent Powers brought it to the chemist. I made a chemical analysis of the contents of that bottle. The bottle contained distilled spirits, commonly known as jackass

(Testimony of F. D. Stribling.)

brandy, containing $48\frac{1}{4}$ per cent of alcohol by volume. It was fit for beverage purposes. The seal on the top of the bottle is our seal, the seal of our office. It was placed on that bottle in our office.

EXCEPTION No. 14.

Mr. FINK.—I ask at this time that there be introduced in evidence this bottle of distilled spirits identified by Mr. Powers and testified to contain 48 and a fraction per cent of alcohol by volume.

Mr. O'DEA.—We will object to the introduction of it on the ground that it is immaterial, irrelevant and incompetent, it has not been properly identified by Agent Powers, and that it was taken in violation of the defendant's constitutional rights.

The COURT.—The objection is overruled.

Mr. O'DEA.—I take an exception.

(The bottle was marked U. S. Exhibit 2.)

On cross-examination, the witness testified as follows:

I made the analysis of this liquor personally. I don't know what date it was made, sometime after December 4th. I do not know that this was the bottle that they took from the place there. The bottle was kept in the storeroom.

That thereupon the Government rested, and the defendant offered no further testimony. [86]

EXCEPTION No. 15.

Mr. O'DEA.—No further testimony for the defendant. In order to protect the defendant's rights,

I will have to ask again for a directed verdict, if your Honor please, on the ground that the evidence is insufficient to sustain a conviction on any of the counts, and on the further ground that all of the evidence offered here by the Government and admitted in evidence was taken in violation of the defendant's constitutional rights.

The COURT.—As far as the latter objection is concerned, as I have said, I have ruled on it frequently in response to your different objections; as to the evidence being insufficient, I will have to advise the jury the evidence here in legal effect is quite sufficient to warrant the conviction of the defendant if it satisfies the jury to the extent I shall advise them.

Mr. O'DEA.—Just for the protection of the defendant's rights I want the record to show that I make a formal motion now, at the termination of all of the evidence in the case, that all of the evidence taken from the place be excluded.

The COURT.—I have ruled on that a number of times.

Mr. O'DEA.—I know. It is just for the protection of the defendant's rights, and not any attempt to be facetious.

The COURT.—It never requires more than one motion or one objection to the same effect to protect any defendant's rights on a given subject.

Mr. O'DEA.—I note an exception.

(Thereupon counsel proceeded to argue the case, at the conclusion of which the following proceedings were had.) [87]

Charge to the Jury.

The COURT. (Orally).—This information, as you have been advised, charges the defendant with three several acts which constitute criminal offenses under the so-called Volstead of Prohibition Act. The first count charges the defendant with having, on or about December 1, 1922, at the address testified to, had wilfully and knowingly in his possession certain property designed for the manufacture of liquor, to wit, three 20-gallon stills, three oil stoves, one hydrometer, 1500 gallons of mash, then and there intended for use in violating Title 2 of the Act of Congress of October 26, 1919, to wit, the National Prohibition Act. That Act makes it a criminal offense for one to have in his possession without authorization of law property designed for the purpose of producing liquor. That was designed by Congress as one of the means of preventing the manufacture of illicit liquor for the purpose of evading the Prohibition Act.

The second count charges that on or about the same date, that is, the 1st day of December, 1922, at the same place, the defendant then and there wilfully and unlawfully possessed certain intoxicating liquor, to wit, 25 gallons of what is called jackass brandy, then and there containing one-half of 1 per cent or more *or* alcohol by volume, which was then and there fit for use for beverage purposes. The law provides that it shall be fit for beverage purposes without intending to determine whether or not it is what we would say in common parlance was fit

for our consumption, but which may be used for beverage purposes to distinguish it from wood alcohol, or other substances which are not, in their nature, fit for beverage purposes.

The third count charges the defendant with having on or about the same date manufactured intoxicating liquor, to wit, 25 gallons of what is called jackass brandy, which is also made a criminal [88] offense under the statute.

Now, to this information the plaintiff has interposed a plea of not guilty, and that casts the burden upon the Government to establish the truth of the allegations of the information to your satisfaction and beyond a reasonable doubt before it can ask a verdict of guilty. Proof beyond a reasonable doubt simply means such proof as would satisfy the minds of the jury to a moral certainty; that is such degree of proof as would induce any one of you to take particular action in an important affair of your own life. When that which is laid before you in the way of evidence satisfies you to that extent, it is termed by the law proof to a moral certainty, or beyond a reasonable doubt. It does not mean that the Government is called upon to make a case which leaves no possible room for doubt of any character, but it means that degree of proof which satisfies you beyond what the law terms a reasonable doubt; and that means precisely what is says, a doubt which would rise in the mind of a man of ordinary intelligence, and say that he did not feel satisfied to a moral certainty. When the Government has made proof to you to a degree which does satisfy you to a moral certainty,

then it has made proof to you beyond a reasonable doubt.

In this case the evidence is before you, and it is for your consideration alone. The Court states to you the law, and by that you are bound, but you are not bound by any suggestion of the Court, nor any intimation it may give during the trial, bearing upon the question as to whether it believes a witness or does not, because that is not its function. Sometimes the Court will make a ruling in response to an objection which may possibly convey to your minds an idea that the Court believes or does not believe some statement that has been made. You are not bound by that, at all, and, in fact, should ignore it unless it falls in with your judgment, when you come to review the entire evidence in the case, because it is your function and your responsibility as well to find [89] the facts in the case.

If you find to the degree of certainty that I have indicated that the defendant is guilty under any one or more of these counts, it will be your duty to find him guilty. If you are left with a reasonable doubt upon your mind under any one or all of these counts as to his guilt, then you are bound to give him the benefit of that doubt by an acquittal. The evidence here, as I have suggested, in answer to the motion of defendant's counsel for a directed verdict upon the ground that the evidence was insufficient, is quite sufficient in its legal tendencies, that is, as a matter of law, it is quite sufficient to sustain a verdict of guilty against this defendant under each one of these counts; but whether it satisfies you to the ex-

tent I have indicated is an entirely different question. Its legal tendency means that it is evidence which tends to prove the facts in question, and if it does, then the Court is bound to admit it before you; but as to its probative value, that is, as to whether it satisfies your own minds to the extent that the law requires, is a question of fact, and something entirely for your determination.

Where an information or an indictment contains two or more counts, then it is the province of the jury to find a verdict against the defendant as the evidence shall warrant them in their judgment, under one or more or all of the counts; and it is equally their privilege, under such an information, if the evidence leaves them in doubt under one or more or all of the counts, to find the defendant not guilty. But that is your function.

(Thereupon, at 3:20 P. M., the jury retired and returned into court at 3:25, with a verdict of guilty as charged.) [90] Thereupon said Court continued said case to the 5th day of May, 1923, for judgment at which time said case was continued to May 8, 1923, when the Court rendered its sentence and judgment upon the defendant and granted to said defendant by orders of the Court based upon stipulation of the parties extensions of time in which to lodge and settle his proposed bill of exceptions; that said proposed bill of exceptions was lodged on the 12th day of July, 1923, and that time was granted and extended by stipulation of the parties and orders of the Court to and including the 27th day of August, 1923, in which to settle same.

That said defendant hereby presents the foregoing as his bill of exceptions herein and respectfully asks that the same be allowed, signed and sealed and made a part of the record in this case.

Dated this 2d day of August, 1923.

EDWARD A. O'DEA,
Attorney for Defendant. [91]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JOE TEMPERANI,
Defendant.

Notice of Presentation of Bill of Exceptions.

To John T. Williams, United States Attorney, and
Grove L. Fink and Thomas J. Sheridan, As-
sistant United States Attorneys:

You will please take notice that the foregoing constitutes and is the proposed bill of exceptions of the defendant in the above-entitled cause, and the said defendant will apply to the said Court to allow said bill of exceptions and to sign and seal the same as the bill of exceptions herein.

EDWARD A. O'DEA,
Attorney for Defendant. [92]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Stipulation Re Bill of Exceptions.

It is hereby stipulated and agreed that the foregoing bill of exceptions is correct and that the same may be signed, settled, allowed and sealed by the Court.

Dated this 2d day of August, 1923.

JOHN T. WILLIAMS,

United States Attorney.

EDWARD A. O'DEA,

Attorney for Defendant. [93]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE TEMPERANI,

Defendant.

Order Settling Bill of Exceptions.

This bill of exceptions having been duly presented to the Court within the time allowed by law and the rules of the Court and within the time extended by the Court by orders duly and regularly made, is now, signed, sealed and made a part of the records in this case, and is allowed as correct.

Dated this 8th day of August, 1923.

WM. C. VAN FLEET,
United States District Judge.

Due service of the within bill of exceptions is hereby admitted this 2d day of August, 1923.

JOHN T. WILLIAMS,
United States Attorney.

S—F. T. C.

[Endorsed]: Filed Aug. 8, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [94]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,554.

JOE TEMPERANI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Admission of Service on Writ of Error.

Due service of the writ of error on file herein and the receipt of a copy thereof is hereby admitted this 17th day of October, 1923.

JOHN T. WILLIAMS,

U. S. Attorney.

By T. J. SHERIDAN.

[Endorsed]: Filed Oct. 18, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[95]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,554.

JOE TEMPERANI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Admission of Service on Citation on Writ of Error.

Due service of the citation on writ of error on file herein and the receipt of a copy thereof is hereby admitted this 17th day of October, 1923.

JOHN T. WILLIAMS,

U. S. Attorney.

By T. J. SHERIDAN.

[Endorsed]: Filed Oct. 18, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[96]

Certificate of Clerk U. S. District Court to Transcript on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 96 pages, numbered from 1 to 96, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of the United States of America, vs. Joe Temperani, No. 12,554, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein), and the instructions of the attorneys for defendant and plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of thirty-six dollars and twenty-five cents (\$36.25), and that the same has been paid to me by the attorneys for the plaintiff in error herein.

Annexed hereto are the original writ of error (page 98), return to writ of error (page 99) and original citation on writ of error (page 100).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 24th day of October, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,
Deputy Clerk. [97]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Joe Temperani, plaintiff in error and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Joe Temperani, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, to—

gether with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 17th day of October, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal]

WALTER B. MALING,
Clerk of the United States District Court, Nor.
District of California.

By C. W. Calbreath,
Deputy.

Allowed by

JOHN S. PARTRIDGE,
Judge.

Receipt of a copy of the within writ of error is hereby admitted this — day of —, 1923.

[Endorsed]: No. 12,554. United States District Court for the Northern District of California. Joe Temperani, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error (Original). Filed Oct. 17, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[98]

Return to Writ of Error.

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 18th day of October, A. D. 1923, duly lodged in the case in this court for the within named defendant in error.

By the Court.

[Seal]

WALTER B. MALING,
Clerk United States District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [99]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to United States of America and to John T. Williams, Esq., United States Attorney, and to Grove J. Fink, Esq., and Thomas J. Sheridan, Esq., Assistants to the United States Attorney,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Joe Temperani is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 17th day of October, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

Receipt of the within citation on writ of error is hereby admitted this — day of —, 1923.

U. S. Attorney.

[Endorsed]: No. 12,554. United States District Court for the Northern District of California. Joe Temperani, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error (Original). Filed Oct. 17, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [100]

[Endorsed]: No. 4129. United States Circuit Court of Appeals for the Ninth Circuit. Joe Temperani, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

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F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOE TEMPERANI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE SOUTHERN
DIVISION OF THE UNITED STATES DIS-
TRICT COURT OF THE NORTHERN
DISTRICT OF CALIFORNIA,
FIRST DIVISION.

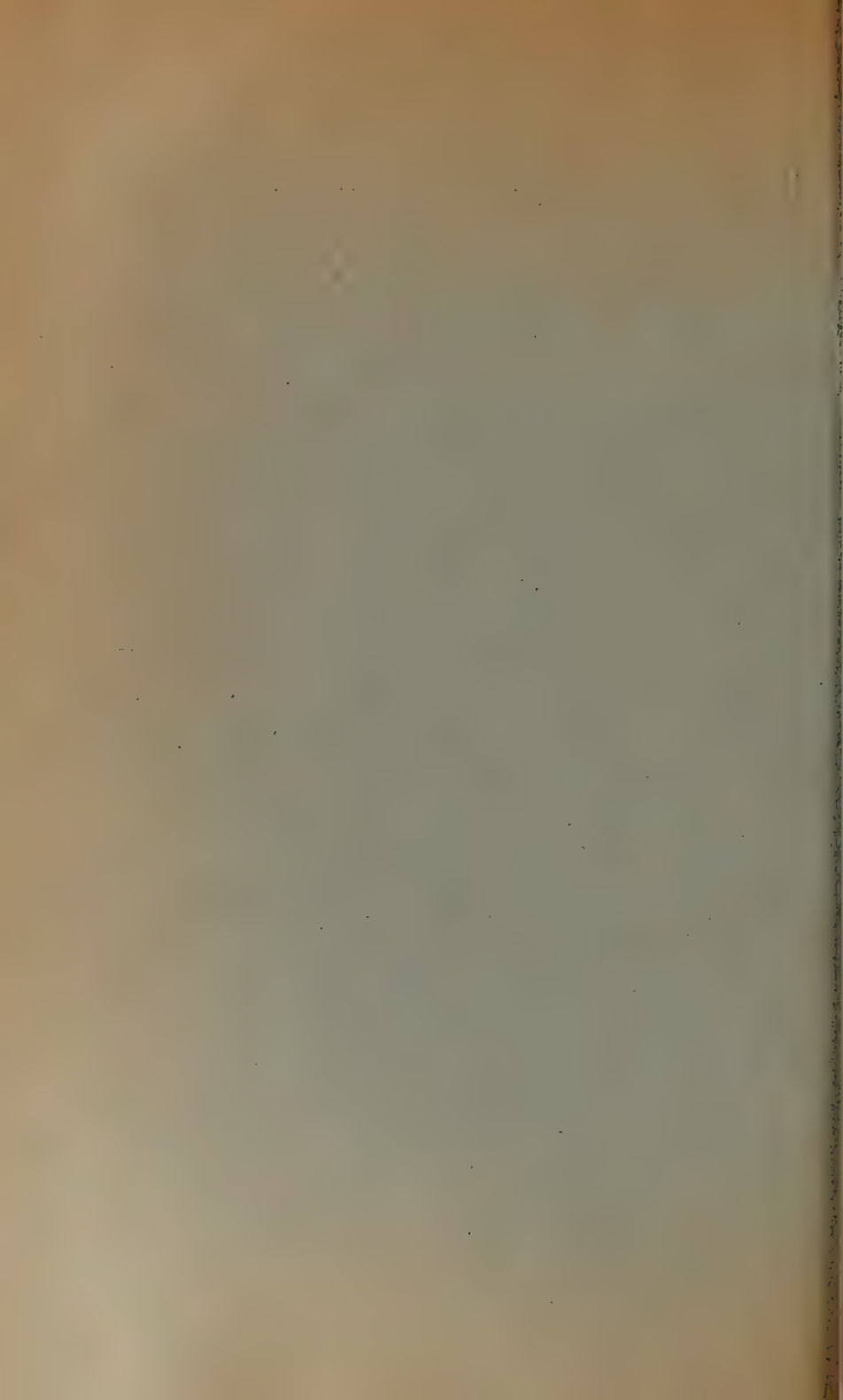
BRIEF FOR DEFENDANT IN ERROR

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BRIEF FOR DEFENDANT IN ERROR

STATEMENT.

The defendant, Joe Temperani, prosecutes a writ of error to the United States District Court of the Northern District of California to reverse a sentence of conviction against him for three violations of the "National Prohibition Act."

On January 3, 1923, an Information in three counts was presented against the defendant; the charging portion of the first count was as follows:

“Defendant heretofore, to wit, on or about 1st day of December, 1922, at 354 Orazabo St., in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully, and unlawfully have in his possession certain property designed for the manufacture of liquor, to wit, 3 20-gal. stills; 3 oil-stoves; 1 hydrometer; 1500 gals. of mash,—then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

The charging portion of the second count was as follows:

“Defendant, heretofore, to wit, on or about the 1st day of December, 1922, at 354 Orazabo St., in the City and County of San Francisco in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there unlawfully and wilfully possess certain intoxicating liquor, to wit, 25 gals. of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume

which was then and there fit for use for beverage purposes.”

The charging portion of the third count was as follows:

“Defendant heretofore, to wit, or or about the 1st day of December, 1922, at 354 Orazabo St., in the City and County of San Francisco in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully manufacture certain intoxicating liquor, to wit, 25 gallons of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.”

It was set forth in each count that the act complained of was then and there prohibited, unlawful and in violation of specified sections of the “National Prohibition Act”.

The defendant upon being arraigned pleaded not guilty (Trans. of Rec. p. 55). At the trial the defendant was found guilty as charged and was thereupon sentenced to pay a fine of \$250 on the first count of the Information, to pay a fine of \$250 on the second count, and to be imprisoned for a period of six months in the San Francisco County Jail on the third count.

At the trial, E. A. Powers, testified for the United States in substance as follows:

Witness is a Prohibition Agent and was on December 1, 1922. On that day he saw the defendant at 334 Orazabo Street, San Francisco, California, at his home. Another Agent, Walter Laumeister was with witness. On that day witness received information that defendant was operating a still in the basement of his residence and the Agents investigated and "you could smell it half a block away. You could smell the mash from the stills". The agents rang the bell upstairs. There was no answer. They went to the garage and rear and there was no answer and they walked through the rear door. They entered the basement or garage. It was locked. To get in they shoved the door in. They forced the entrance. They found three twenty-gallon stills in full operation and found a hydrometer and 1500 gallons of mash and twenty-five gallons of jackass brandy. They waited there about five minutes afterwards the defendant drove up in a Cole car. He stepped from the car. The Agents asked if it was his premises and he said "yes" and the agents walked into the garage with the defendant and he admitted they were his stills. Defendant was asked "These are your stills, Temperani?" He said, "Yes. Who told you I was operating?" Three 20-gallon stills were on stoves and were burning and the mash was cooking. The boilers were full of mash and the stills were full of mash and the fire was burning under them. They were operating. It was in process of distillation. Besides the three stills the Agents found one hydrometer, 1500 gallons of mash and twenty-

five gallons of brandy. The agents had information that he was running the still; that he was manufacturing (Trans. of Rec. pp. 78-79). The brandy was in a sort of container and dropped from the cooler into the container. The defendant did not say the brandy belonged to him. He said the stills and apparatus were his. A sample of the brandy was taken. Witness identifies the bottle.

On cross-examination, witness testified that he did not have a search warrant to search the premises in which the defendant is accused of having this property. The premises were a one-story building and basement. The agents entered through the rear into the still room, the basement or garage. It was not a furnished basement. There was plenty of room for the car. It was not connected in any way by opening a door on the stairway with the residence, "or with the upper or residence part of the building." Agents had to enter from the outside. The first information was received from Police Sergeant Tutenberg. He told witness that there was a still being operated in the basement of Temperani's home. Laumeister and witness went to the premises because they had the information. That was the primary reason for his going. When they got to the place they went to the front of same. They could smell it a half block away. They investigated and found the smell came from that particular place. You could smell the strong odor until you got right there. The agents tried the garage door. Did not

see any still then. Went to the front door upstairs. Rang the bell and got no response. Then witness walked around to the back door. The place was enclosed by a fence and had a side entrance. Witness opened the door to the side entrance and walked into the yard and tried to force the door leading into the garage. It did not open. Witness shoved it in. The basement and garage are all in one place. It was not subdivided off at that time. Witness broke the door leading into the garage. Could see the stills as soon as the door was open. Did not go into a rear room. Went directly from the yard into the garage. Did not at any time enter any of the rooms in the "dwelling or upper part." Witness went directly from the yard into where the stills were operating. Did not break any other door to go into the place where the garage was. Did not notice what was in the basement besides the garage for the automobile other than a couple of cases of dried apricots in the basement. Did not investigate the property. There were steps leading from the front of the house to the street. The basement and the dwelling house were on the same lot. The basement formed a part of the building. Witness was never upstairs at all in the house, nor was Agent Laumeister (Trans. of Rec. pp. 80, 81, 82, 83). Witness continuing: Had no knowledge that the defendant at that time lived at any other place. Witness never made a purchase from the premises. When witness first went to the premises, defendant was in there and there was no automobile there. He drove up to the side of the

house in a Cole-Eight along side of the fence. He stepped out and walked into the basement. First he claimed he did not own it and then he did. We did not take him into custody before we went into the place. He walked into the place with us. It was a basement that they could store a machine in. The defendant told me it was a garage and afterwards said that he did not keep his machine in there but kept it elsewhere. The basement was not a finished basement. There was room for an automobile. There was a large door.

On re-direct witness testified: That the three copper receptacles shown were stills for making brandy. That he can identify the stills as those referred to in his examination and were seized December 1, 1922, at 334 Orazabo Street. They were seized by witness and Agent Laumeister and were in full operation at the time witness went there. Witness dumped the brandy in the sewer and poured coal oil into the mash. Witness seized the brandy in the basement. It was running from the cooler into the container. Witness destroyed 25 gallons. Did not see the defendant in that place manufacture any brandy. Witness saw the material, however, in the process of manufacture (Trans. of Rec., p. 85). It is further shown that the spirits referred to contained 59.79 per cent of alcohol by volume. Thereupon the stills were put in evidence and later the bottle of spirits taken at the same time was put in evidence.

The defendant Temperani testified on his own behalf and said that on December 1, 1922, he lived on Orazabo Street with his wife and children. Witness claimed to occupy two rooms upstairs and one down stairs; that he had food in the basement; that there was a garage in front and that it was partitioned off for food for the house. There were steps leading up from the back of the place to down stairs in the yard and that witness and family would use the back steps to go to the basement several times a day. The kitchen was in the upper floor. To go from the kitchen to the back yard you would go from the back door down the stairs into the back yard.

On cross-examination defendant was asked "were these three stills in evidence in the basement of your premises on December 1, 1922". Witness answered "when the men got there they found them in the basement" and "when they came there they found them in the basement". Witness was asked how they got there and said he brought them there. Witness was asked if there was any mash there at that time and answered there were two barrels. He was asked if there was any brandy and he said he didn't think there was any there. He was again asked if there was any jackass brandy in quantity about 25 gallons there on that date and he said he did not believe there was and then said he didn't know. He said he didn't know whether the stills were in operation. He said he went away in the morning

and didn't know whether the stills were going or not. (Trans. of Rec. pp. 87, 88, 89, 90, 91).

Previous to the trial the defendant made a motion for the return to him of the property seized and for the exclusion of the same from evidence, the petition being verified. It was contended that the property was taken in violation of the Fourth and Fifth Amendments. In opposition to the motion the government presented the affidavit of Agent Laumeister who stated that he was a Federal Prohibition Agent acting as such under the Federal Prohibition Director for the State of California and thereupon deposed as follows:

“That the premises at 354 Orazabo Street in the City and County of San Francisco, State of California, is a one-story building with a garage underneath; that the opening to the garage is from said Orazoba Street, which said garage is disconnected from the other portion of the building in that there is no ingress or egress from the said garage into the building above the said garage; that prior to the first day of December, 1922, affiant, together with Prohibition Agent E. A. Powers, had reliable information that there was intoxicating liquor being manufactured, and sold from the said garage. That thereafter, and upon the first day of December, 1922, affiant together with the other Prohibition Agent, were near the premises, to wit, No. 354 Orazabo Street, said city and county, and affiant by his sense of smell discovered the odor of intoxicating liquor, to wit, jackass brandy, and the odor of cooking mash, to wit, mash used

in the manufacture of intoxicating liquor, coming from the said garage, and following the said odor affiant and said other Prohibition Agent entered the said garage and then and there found therein, three 20-gallon stills in full operation, that is to say, three stills used in the manufacture of intoxicating liquor, to wit, jackass brandy, the said stills being then and there properly designed for the manufacture of intoxicating liquor, to wit, jackass brandy, containing one-half of one percentum and more of alcohol by volume and fit for use for beverage purposes. And in addition thereto, affiant and other Prohibition Agent found three coal-oil stoves lighted and burning underneath the said stills, one hydrometer, 1500 gallons of mash, to wit, the kind of mash used in the manufacture of intoxicating liquor, to wit, jackass brandy, and 25 gallons of intoxicating liquor, to wit, jackass brandy containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and affiant and said other Prohibition Agent then and there seized the above-mentioned property and the same is now in the possession of the Federal Prohibition Director for the State of California, to wit, Samuel F. Rutter.

That thereafter the said defendant, J. Temperani, stated to affiant that the said stills and the property hereinbefore mentioned belonged to him and that he was manufacturing the said intoxicating liquor. That thereafter, and on the said first day of December, 1922, affiant arrested the said defendant J. Temperani and filed an information charging the said defendant with

having in his possession property designed for the manufacture of intoxicating liquor, to wit, three 20 gallon stills, three coal oil-stoves, 1 hydrometer, and 1500 gallons of mash being the kind of mash used in the manufacture of intoxicating liquor, and with the possession of the said property, and with the manufacture of intoxicating liquor, to wit, twenty-five gallons of jackass brandy then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, and which said action is now pending in the above-entitled court. That the said defendant at the time of the manufacture of the said intoxicating liquor had no permit to manufacture the same or to have the said or any intoxicating liquor in his possession.

That affiant did not nor did the other Prohibition Agent at any time enter any of the residential portion of the said building but confined their entrance and their search and seizure to the said property hereinbefore described which was in the garage as hereinbefore set out, and that the entrance to the said garage was not made by the said affiant or any other Prohibition Agent through any portion of the said building located above and over the said garage.

That affiant at all of the times herein mentioned was and is familiar with the odor of cooking mash, to wit, mash used in the manufacture of intoxicating liquor, and with the odor of intoxicating liquor, to wit, jackass brandy, manufactured by the distillation of mash and containing one-half of one percentum and more of alcohol by volume and fit for use for beverage

purposes. That at all of the times herein mentioned said liquor was illicit and contraband.”

The motion was denied by Judge Bean.

At the trial of the case, immediately following the empanelment of the jury, the defendant renewed his motion and read to the court his said verified application and thereupon the government read in response the above mentioned affidavit of Laumeister. The motion was denied by Judge Van Fleet, who was trying the case. When the contraband property, the stills and the sample of the brandy were offered in evidence, the defendant objected to their introduction. The objection was overruled and they were received in evidence. (Trans. of Rec. pp. 86 and 93.)

The defendant made a motion for a directed verdict of not guilty which was denied. (Trans. of Rec. p. 97.) The charge of the court appears at pages 98-101 of the Trans. of Rec. The defendant did not take any exceptions to the charge, nor did he propose any instructions on his own behalf.

The plaintiff in error has made thirteen assignments of error, but appears to mean by them the single point presented by him in his brief. The only question urged or argued by the plaintiff in error in his brief is stated by him as follows:

“The Court erred in admitting in evidence property taken from the defendant’s dwelling and information obtained in violation of the

fourth and fifth amendments to the Constitution of the United States, on account of the unreasonableness of the search and seizure, in that Federal Officers had no search warrant to search the dwelling of the defendant, or a private place in same, or to seize property therefrom."

No objections are taken to the charge, nor to the sufficiency of the Information. We confine our discussion to the single question argued.

ARGUMENT.

THE SEIZURE OF THE 20 GALLON STILL
AND THE MASH AND BRANDY WAS
NOT UNREASONABLE NOR ILLEGAL;
IT WAS INCIDENT TO A LAWFUL AR-
REST; NO WARRANT WAS REQUIRED.
THE ARTICLES SO SEIZED WERE COM-
PETENT EVIDENCE.

It was shown at the trial that two Prohibition Agents, coming to know from the sense of smell that there was being distilled in the basement beneath the residence of defendant intoxicating liquors, thereupon entered, seized three 20-gallon stills and stoves in flagrant active operation, also 1500 gallons of mash and 25 gallons of jackass brandy. The mash was rendered innocuous, the brandy all destroyed except the sample, and the stills seized and produced in court and received in evidence. The defendant admitted the ownership of the stills and that he "was operating."

That the testimony so offered and received was *relevant* is indisputable. That it was *sufficient* to prove the defendant guilty as charged is equally clear. The sole controversy now raised by the defendant is as to the *competency* of the particular evidence as against him. He bases his objection on such incompetency to the fact that the taking was made without a search warrant.

We may observe in passing that this question of *competency* is to be decided by the court upon such proof taken on *voir dire* as may be convincing. The offer on its face was apparently competent. It thus became the obligation of the defendant to show by outside facts anything he could as against such competency. This he undertook to do in advance of the trial by a motion for return of property and suppression of the evidence; this was in accordance with the decisions holding that if the objection be not raised until the time of trial, the court will not suspend to determine a collateral issue. This preliminary motion was renewed after the empanelment of the jury and before the taking of evidence upon the same proof, that is to say, upon affidavits. It thus results that in determining this question of competency, the court could have considered the affidavit of Agent Laumeister, who was not produced at the trial, as well as the oral testimony of Agent Powers who testified at the trial.

The defendant grounds his objection to the competency of the evidence in part upon the provisions

of Section 25 of Title II of the "National Prohibition Act," which provides generally that "no search warrant shall issue" except under certain circumstances. But no consideration need be given to this section nor to the cases applying it for the reason that it is nowhere contended that there was any search warrant issued. And to defendant's citation of the provisions of the Fifth Amendment to the Constitution of the United States in the same connection, it is sufficient to note that the inhibition of that Amendment was not against searches or seizures without warrant, but as "against unreasonable searches and seizures."

And, as certain of the cases hereinafter cited point out, at the time of the adoption of the Amendment it was a well recognized exception to the rule requiring a warrant for a search or seizure, that an officer might without such warrant arrest a person committing a crime in his presence and thereupon search his person or immediate surroundings and seize the thing by means of which he was committing the crime. The seizure of the offending things in the instant case is here justified by the government as within the principle so invoked. We are unable to see how there could be any serious contention that when the officers detected the odor of cooking mash as coming from the basement and thus came to know that the "National Prohibition Act" was being flagrantly violated then and there, they had not the right to arrest the defendant, which they did, or that they had not the right to arrest or

seize the offending thing and thus interrupt the commission of a crime and this without any warrant therefor. Neither the arrest of the defendant or of the offending things was an unreasonable search within the purview of the amendment. We cite the following cases holding and applying the principle.

This Court in the case of

Vachina vs. U. S., 283 Fed. 35, 36,

said:

“The Fourth Amendment to the Constitution, which prohibits unreasonable searches and seizures, is to be construed in conformity with the principles of the common law. At common law officers may arrest those who commit crimes in their presence, and they may avert a crime in the process of commission in their presence, by arrest, and without a search warrant they may seize the instrument of the crime. *Bishop, New Crim. Proc.* Sec. 183; *Byrne, Federal Crim. Proc.* Sec. 10. The question which is here presented was before this court in *Kathriner v. United States*, 276 Fed. 808, which we held, under circumstances almost identical with those here disclosed, that liquor may be seized without a search warrant. Other similar rulings are found in *United States v. Borkowski* (D. C.) 268 Fed. 408; *United States v. Camarota* (D. C.) 278 Fed. 388; *In re Mobile* (D. C.) 278 Fed. 949; *United States v. Snyder* (D. C.) 278 Fed. 650.”

The same rules applied by this court in the case of

Lambert vs. U. S., 282 Fed. 413, 416,
wherein this court said:

“What is prohibited by the Fourth Amendment of the Constitution, as will be seen from the foregoing, is the unreasonable search or seizure of the person, home, papers, or effects of any of the people of this country without a warrant issued upon reasonable cause, supported by oath or affirmation particularly describing the place to be searched and the person or thing to be seized. It is not claimed that either of the officers who made the search and seizure here involved acted by virtue of any warrant, or that they made any attempt to procure a warrant upon the information conveyed to them by Edison. Under the circumstances of the case, was that essential?”

The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case.”

In the case of

Dillon vs. U. S., 279 Fed. 639, 647,

the Circuit Court of Appeals of the Second Circuit applied the same principle and quoted with approval from the case, *ex parte*

Morrill, 35 Fed. 261, 267,

as follows:

“In other words, a crime is committed in the presence of the officer when the facts and cir-

cumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe, or reasonable ground to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye or an ear witness of every fact and circumstance involved in the charge, or necessary to the commission of the crime."

And referring to a case previously decided in the same court said:

"And in *Wiggins v. United States*, 272 Fed. 41, 45, we stated our belief that, where liquors were being sold in violation of law, the officers, who witness the commission of the offense, have as much right to seize the liquors without a search warrant as they have to apprehend the wrongdoer without a warrant of arrest. We see no violation of any constitutional right of the defendant in taking possession of the liquors, which the defendant had in his unlawful possession and of which an unlawful use was being made in the presence of the officers."

In the case of

McBride vs. U. S., 284 Fed. 416, 419,

the Circuit Court of Appeals of the Fifth Circuit applied the same principle and said:

"At common law it was always lawful to arrest a person without warrant, where a crime was being committed in the presence of an officer and to enter a building without warrant, in which such crime was being perpetrated. *Wharton, Criminal Procedure* (10th Ed.), Secs.

34, 51; *Delafoile v. New Jersey*, 54 N. J. Law, 381, 24 Atl. 557, 16 L. R. A. 500, 502; *In re Acker* (C. C.), 66 Fed. 290, 293.

Where an officer is being apprised by any of his senses that a crime is being committed, it is being committed in his presence, so as to justify an arrest without warrant. *Piedmont Hotel v. Henderson*, 9 Ga. App. 672, 681, 72 S. E. 51; *Earl v. State*, 124 Ga. 28, 29, 52 S. E. 78; *Brooks v. State*, 114 Ga. 6, 8, 39, S. E. 877; *Ramsey v. State*, 92 Ga. 53, 63, 17 S. E. 613. Therefore we are of the opinion that the entry into this stable under the circumstances of this case was legal, and that the court did not err in admitting the testimony of the officers."

The evidence of the commission of crime in the McBride case was derived principally or wholly through the sense of smell.

The case of

U. S. vs. Borkowski, 268 Fed. 408, 412,

was a case of the same character wherein the officers through the sense of smell came to know that a crime was being committed. The District Court in that case said:

"The rule, state and federal, is that officers may arrest those who break the peace or commit crimes in their presence. *Bishop's new Crim. Proc.*, Sec. 183; *Byrne, Fed. Crim. Proc.*, Sec. 10; *Wolf v. State*, 19 Ohio St. 248. Byrne states that officers may avert a criminal act in the process of commission before them, either by arresting the doer or seizing and restraining

the instrument of the crime. See also *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; *Ex parte Morrill* (C. C.), 35 Fed. 261; *Bad Elk v. U. S.*, 177 U. S. 530, 20 Sup. Ct. 729, 44 L. Ed. 874, and *Kurtz v. Moffit*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458. If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."

Other pertinent cases turning upon the principle that an officer may make an arrest for a crime committed in his presence without a warrant and as incident to such lawful arrest, may make a further search of the person and surroundings of the party arrested, are the following:

U. S. vs. Daisin, 288 Fed. 201

Kathriner vs. U. S., 276 Fed. 808

O'Connor vs. U. S., 281 Fed. 396

Green vs. U. S., 289 Fed. 236

U. S. ex rel. Flynn vs. Fuellhart, 106 Fed. 911.

As against this array of authorities, the contention of the defendant as we understand it is: that under the provisions of the Act supplemental to the National Prohibition Act of November 23, 1921 (C. 734, Sec. 6, 42 Stat.) (*Barnes Fed. Code Cumm. Supp.* 923, 750) there was a violation of his rights in that his dwelling was searched without a warrant. The Act in question was supplemental to the National Prohibition Act and it is not presumed that there was any intention to make the Act less effective. It is provided generally in the supplemental Act that *any* officer, agent or employe of the United States engaged in the enforcement of the Prohibition Act *or any other law of the United States*, who shall search any private dwelling as defined in the Prohibition Act and occupied as such dwelling without a warrant directing such search is guilty of a crime.

There is no provision in this Act against the lawful arrest without warrant for a crime committed in the presence of the officer. It is significant that the word "search" alone is used and nothing is said of a "seizure." The Act does not manifest any purpose to prevent an officer from making an arrest for a crime committed in his presence simply because it happened to be in in a private dwelling; such an assumption would involve startling consequences. The best test of the argument is to invoke the *reducio ad absurdum*. The Act in terms refers to all possible officers of the United States and all possible crimes. No distinction is

made between a crime detected by one sense rather than another. Hence we would have the situation of an officer of the United States seeing a grave crime actually being committed, even murder, and yet if it were in a private dwelling house occupied as such, he would not have the right to make an arrest or seizure, or make any search thereafter incident to such an arrest or seizure. It has all along been the rule that an officer detecting a crime being committed in his presence may arrest the *person* or the *offending thing*, such as an automobile or a still; he has the right and power, in fact it is his pre-emptory duty to *interrupt* and *prevent* the *actual commission* of the *crime*. There is no warrant for assuming that the Congress in passing the supplemental Act in question intended to change the rule of law permitting an officer to arrest for a crime committed in his presence and make a search incident thereto. The only purpose was to punish the making of an unreasonable search, not to alter the law as to *what was* such unreasonable search.

That there was no such change, the case of

Agnello vs. U. S., 290 Fed. 671,

is authority. There the officers, on the evidence of their senses, detected the defendants or some of them in the actual commission of the crime of selling narcotics. Having arrested the defendants, the officers went to the residence of two of the defendants—the Agnello's—and found certain narcotics which they took into their possession. It was con-

tended that while admittedly the agents had the right to arrest the defendants without a warrant, and had a right to search their persons without a warrant, a crime having been committed in the presence of the agents, it was denied that they had the right to go from the place of arrest to another point and there search without a warrant the room of one of the defendants. From the facts so stated, the court suggests the question: that in case an agent arrest without warrant and search the person, is it an unreasonable search and seizure to also search the home without warrant? After consideration, the court reaches the conclusion that the search and seizure of the home was not unreasonable. The court in discussing the question reviews the pertinent authorities hereinabove cited, as well as others, including several of the decisions of this court.

It may be noted further that the incidents complained of in the Agnello case were said to have been on Saturday, January 14th, which would indicate the year 1922, and thus since the enactment of the act supplemental to the National Prohibition Act. The case is further of interest in that it limits and distinguishes to some extent the case of

Ganci vs. U. S., 287 Fed. 60,

decided by the same court and cited here by plaintiff in error.

A brief reference may be made to the citation of authority in the brief of plaintiff in error. Some

35 cases are cited on pages 32 et seq. of the brief without further comment than that they justify him in declaring that the search and seizure in the instant cases was illegal. As to many of them their bearing on the particular question is exceedingly remote and do not justify detailed reference. Another list is cited on page 39 of the brief.

A special reference is made to the cases of

U. S. vs. Fallaco,

U. S. vs. Ross, 277 Fed. 76.

It may be noted that these cases were by the District Court wherein the Judge only discussed the question as to what participation by Federal Officers in a search by State Officers would bind the Government and render the evidence inadmissible in the case of an unlawful search. No discussion whatever was made as to the principle here invoked upon which this case really turns, that is to say, that the officers had the right to arrest and seize for the crime committed in his presence. There may have been something in the undisclosed facts that would have prevented the application of the principle. At any rate the question was not discussed and there can be no authority as against the cases hereinabove cited.

Detailed reference is made to the Ganci case as to which it is sufficient to note that the Agnello case in the same court limited the operation of the Ganci case.

The cases of

U. S. vs. Kelih, and

U. S. vs. Jajeswich

are referred to at length. These were cases where officers acted upon the sense of smell. The decisions were by District Courts where the court was authorized to use its discretion in believing that there was probable cause and may have been fit to disbelieve the officer's statement that he could smell thus and so. But in the case at bar the court below did believe the officers and there is nothing in the case at bar to show that its discretion in so believing was abused. This court in its opinion in

Winkler vs. U. S., No. 4159, Opinion filed
March 24, 1924,

cited with approval certain language from the case of

Snyder vs. U. S., 285 Fed. 1,

to wit:

“Whether the offense was committed in the presence of the officer in this sense is primarily a question for the trial judge and his finding should not be disturbed on appeal unless it is without support in the evidence.”

In the instant case the court sustained the view that the officers had probable cause for knowing that a crime was being committed. In the cases cited by counsel certain District Courts reached contrary conclusions. There is nothing here to show

that the trial court abused its discretion or did not have evidence upon which to base its conclusion.

In brief, we have the case of two officers charged with the duty of enforcing the National Prohibition Act. They swear that at the time in question they detected in a basement beneath the rooms in which the defendant dwelt the odor of cooking mash and the odor of jackass brandy. Thereupon in order to interrupt the commission of a crime, to seize an offending thing, the stills, and to arrest the parties committing the crime, they enter the basement, find the three stills, with fires burning, full of mash and the spirituous liquors running through the pipes into the containers. 1500 gallons of mash were at hand for further use. 24 gallons of brandy had been manufactured. The defendant admitted he "was operating" and that he owned the stills; he so testified at the trial. There is but a single question involved in the case and but a single question argued, that is, were the officers justified in making the arrest and seizing the property without the delay of attempting to obtain a warrant?

We think the judgment should be affirmed.

Respectfully submitted,

JOHN T. WILLIAMS,
United States Attorney,

T. J. SHERIDAN,
*Assistant United States Attorney,
Attorneys for Defendant in Error.*

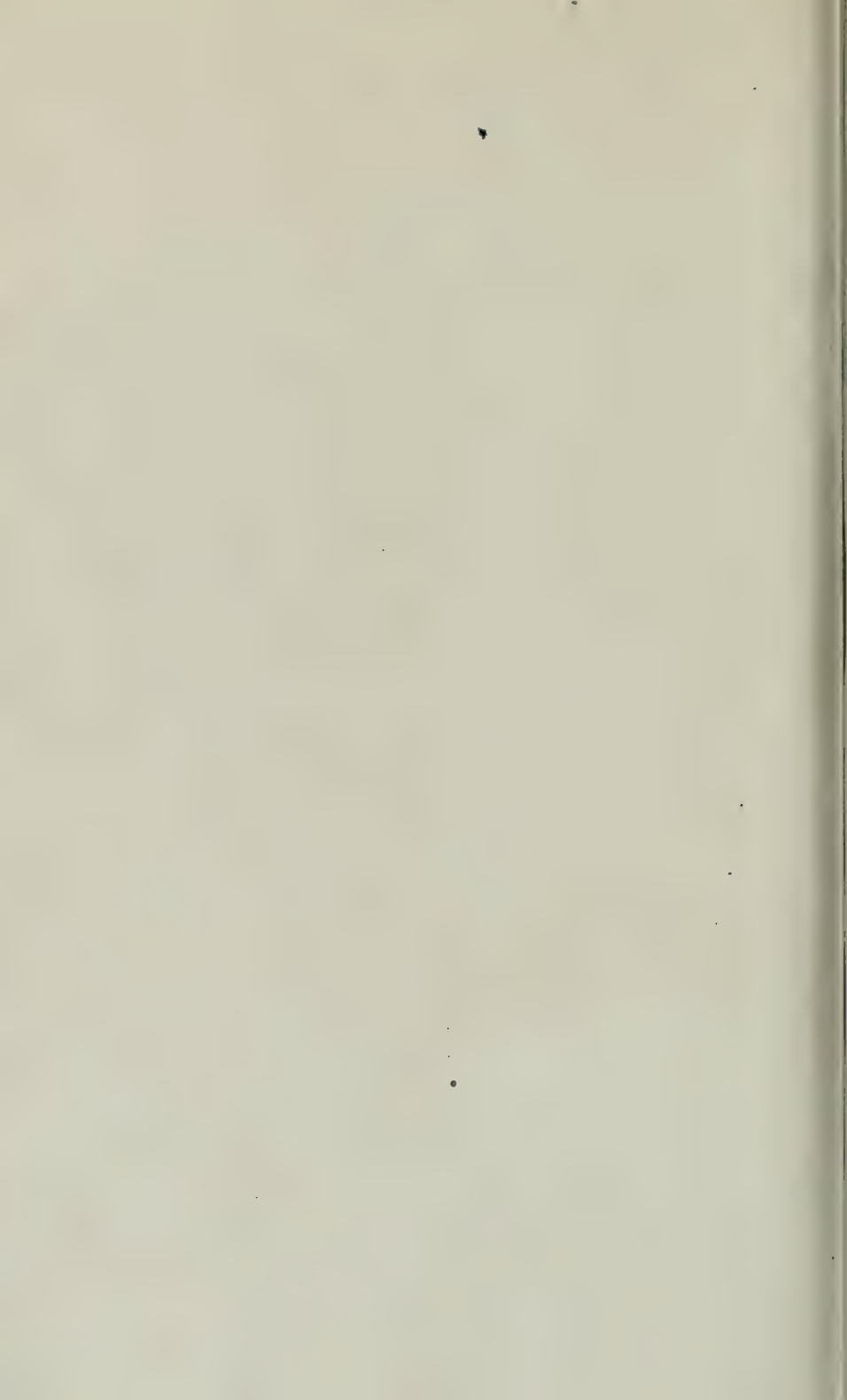
United States
Circuit Court of Appeals
For the Ninth Circuit.

WESLEY LEROY SISCHO,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.**

FILED
DEC 1 - 1973
F. T. MURPHY

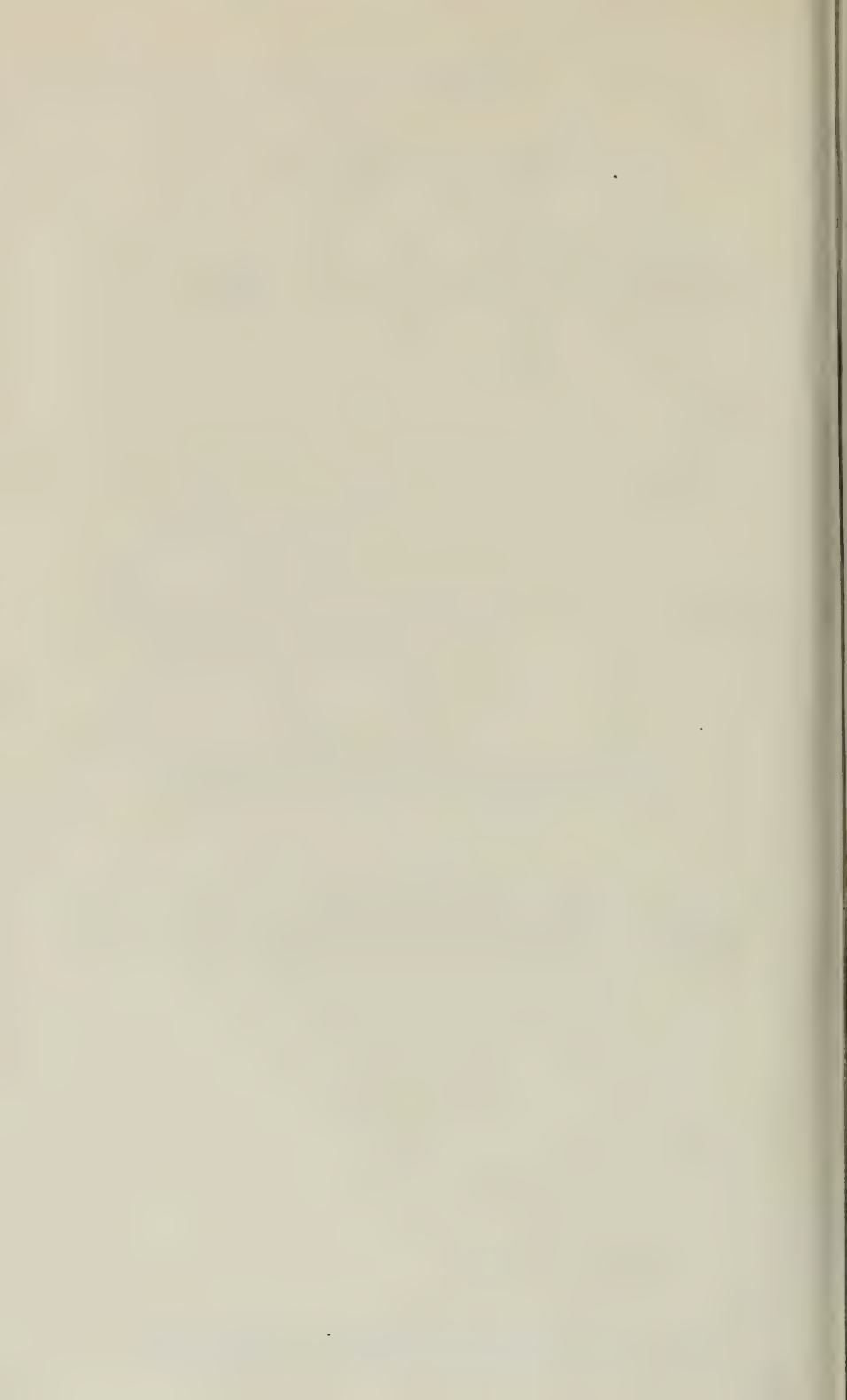


United States
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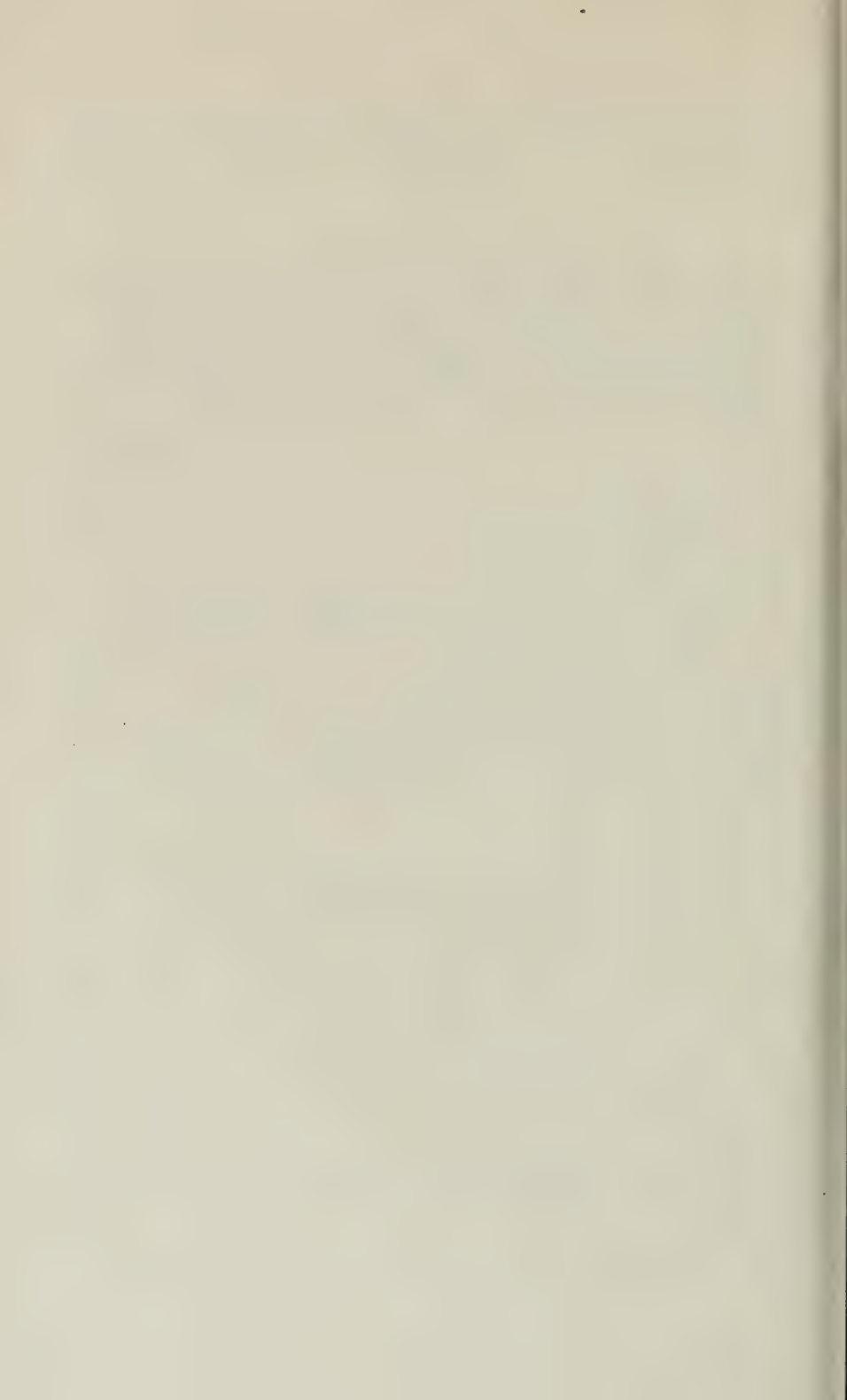
**Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.**



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

W. E. BARNHART, Esq., Attorney for Plaintiff
in Error,

805 Leary Building, Seattle, Washington.

THOMAS P. REVELLE, Esq., United States At-
torney, Attorney for Defendant in Error,

310 Federal Building, Seattle, Washington.

C. E. HUGHES, Esq., Assistant United States At-
torney, Attorney for Defendant in Error,

310 Federal Building, Seattle, Washington.

[1*]

United States District Court, Western District of
Washington, Northern Division.

November, 1922, Term.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Indictment.

Vio. Narcotic Drugs Import and Export Act.

United States of America,

Western District of Washington,

Northern Division,—ss.

The grand jurors of the United States of Am-
erica, being duly selected, impaneled, sworn and

*Page-number appearing at foot of page of original certified Trans-
script of Record.

charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That WESLEY L. SISCHO, on the twenty-second day of November, in the year of our Lord, one thousand nine hundred and twenty-two, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully, unlawfully and fraudulently, and contrary to the law import and bring into the United States from a foreign place to these grand jurors unknown, a certain quantity, to wit, two hundred forty-eight (248) tins each containing five (5) tael of a certain preparation of opium, to wit, opium prepared for smoking, a more particular description thereof being to these grand jurors unknown; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [2]

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That WESLEY L. SISCHO, on the twenty-second day of November, in the year of our Lord one thousand nine hundred and twenty-two, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully, unlawfully,

feloniously and fraudulently buy, receive, and conceal a certain quantity, to wit, two hundred forty-eight tins each containing five (5) taels of a certain preparation of opium, to wit, opium prepared for smoking, a more particular description thereof being to these grand jurors unknown, said preparation of opium prepared for smoking theretofore having been knowingly, wilfully, unlawfully, feloniously and fraudulently and contrary to law imported and brought from a foreign place to these grand jurors unknown into the United States as he, the said WESLEY L. SISCHO, at the time of said buying, receiving and concealing well knew; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,

United States Attorney.

C. E. HUGHES,

Assistant United States Attorney.

[Endorsed]: A True Bill. Byron Phelps, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in open court, in the presence of the Grand Jury, and filed in the U. S. District Court, December 19, 1922. F. M. Harshberger, Clerk. [3]

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United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Arraignment.

Now on this 8th day of January, 1923, the above defendant comes into open court for arraignment accompanied by his attorney, J. J. Sullivan, and says that his true name is Wesley L. Sischo, whereupon he is allowed one week in which to plead.

Journal #10, page 458. [4]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Hearing on Demurrer and Plea.

Now on this 15th day of January, 1923, this cause comes on for hearing on demurrer and plea.

Defendant is present accompanied by his counsel and here and now enters his plea of not guilty. Demurrer is waived and trial is set for January 23, 1923.

Journal #10, page 474. [5]

In the District Court of the United States for the
Western District of Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant Wesley L. Sischo is guilty, as charged in Count I of the indictment herein; and further find the defendant Wesley L. Sischo is guilty, as charged in Count II of the indictment herein.

BERT KINCAID,

Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Motion for New Trial.

Comes now the defendant herein by John F. Dore and John J. Sullivan, his attorneys, and moves the Court to set aside the verdict of the jury rendered herein and to grant a new trial, and for reasons thereof shows to the Court the following:

I.

The verdict is contrary to the law of the case.

II.

The verdict is not supported by the evidence in the case.

III.

The Court upon the trial of the case admitted incompetent evidence offered by the United States.

IV.

The Court upon the trial of the case excluded competent evidence offered by the defendant.

V.

The Court improperly instructed the jury to the defendant's prejudice.

VI.

The Court improperly refused to defendant's

prejudice, to give correct instructions tendered and offered by the defendant.

VII.

Misconduct of counsel for the Government in his remarks to [7] the jury duly excepted to by defendant.

Dated this 23d day of April, 1923.

JOHN F. DORE and
JOHN J. SULLIVAN,
Attorneys for Defendant.

Service duly made.

C. E. HUGHES,
Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 23, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Hearing on Motion for New Trial.

Now on this 23d day of April, 1923, the above cause comes on for hearing on motion for new

trial, with John J. Sullivan appearing as attorney for the defendant. Said motion is denied and sentence is passed at this time.

Journal #11, page 116. [9]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Sentence.

Comes now on this 23d day of April, 1923, the said defendant Wesley L. Sischo, into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered, ordered and adjudged by the court that the defendant is guilty of violating the Narcotic Drugs Import and Export Act and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be here-

after provided for the imprisonment of offenders against the laws of the United States, for the term of seven years on each of counts I and II of the indictment, terms to run concurrently, at hard labor, and to pay a fine of \$2000.00 dollars on each of counts I and II of the indictment. And the said defendant Wesley L. Sischo is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment & Decree #3, page 418. [10]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Petition for Writ of Error.

In the Above-entitled Court, and to the Honorable
EDWARD E. CUSHMAN, Judge Thereof:

Comes now the above-named defendant and by his attorneys and counsel respectfully shows that on the 19th day of April, 1923, a jury impaneled in the above-entitled court and cause, returned a verdict finding the above-named defendant guilty of the indictment theretofore filed in the above-entitled court and cause, and thereafter, within the

time limited by law, under rules and order of this court, the defendant moved for a new trial, which said motion was by the court overruled, and exception thereto allowed, and thereafter, on the 23d day of April, said defendant was, by order and judgment and sentence of the above-entitled Court in said cause sentenced to imprisonment for seven years, and a fine of two thousand dollars on each of the two counts of the indictment.

And your petitioner herein, feeling himself aggrieved by said verdict and the judgment and sentence of the court entered herein as aforesaid, and by the orders and rulings of said court, and proceedings in said cause, now herewith petitions this court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end [11] that the said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and the manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and ruling of the court provided, and therefore, premises considered, your petitioner prays that a writ of error issue to the end that said proceedings of the District Court of the

United States of the Western District of Washington may be reviewed and corrected, the said errors in said record being herewith assigned, and presented herewith, and that pending the final determination of said writ of error by said Appellate Court an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination said defendant be admitted to bail.

JOHN F. DORE,

JOHN J. SULLIVAN,

Attorneys for Petitioner, Plaintiff in Error.

Acceptance of service of within petition acknowledged this 25 day of April, 1923.

THOS. P. REVELLE,

Attorney for Pltf.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 25, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [12]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Assignments of Error.

Comes now the above-named defendant and in connection with his petition for writ of error in this cause, submitted and filed herewith, assigns the following errors which the defendant avers and says occurred in the proceedings and at the trial of the above-entitled cause and in the above-entitled court, and upon which he relies to reverse, set aside and correct the judgment and sentence entered herein, and says that there is manifest error appearing upon the face of the record and in the proceedings, in this:

I.

The Court erred in overruling the motion for new trial herein.

II.

The Court erred in overruling the motion for directed verdict at the close of the Government's case.

III.

The Court erred in giving that part of its instruction to the jury wherein it stated that the jury should not convict the defendant because the defendant had been tried and convicted before of the same offense, to which the defendant duly and regularly excepted at the time.

IV.

The Court erred in refusing to instruct the jury to disregard [13] the statement of the United States Attorney, over the objection of the defendant,

to the effect that the defendant was a convict and that, as a convict, he was unworthy of belief.

V.

The Court erred in sentencing the defendant upon both counts of the indictment.

VI.

The Court thereafter entered judgment and sentence against said defendant, upon the verdict of guilty rendered upon said indictment, to which ruling and judgment and sentence the defendant excepted, and now the defendant assigns as error that the Court so entered judgment and sentence upon the verdict.

And as to each and every of said assignments of error, as aforesaid, the defendant says that at the time of making of the order of ruling of the Court complained of, the defendant duly excepted and was allowed an exception wherever the same appears in the record to the ruling and order of the Court.

JOHN F. DORE,
JOHN J. SULLIVAN,
Attorneys for Defendant.

Acceptance of service of within assignments acknowledged this 25 day of April, 1923.

THOS. P. REVELLE,
Attorney for Pltf.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 25, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

A writ of error is granted this 25th day of April, 1923, and it is further ordered that pending the review hereon said defendant be admitted to bail, and that the amount of the supersedeas bond to be filed by said defendant be Ten Thousand (\$10,000.00) Dollars.

And it is further ordered that upon said defendant's filing his bond in the aforesaid sum, to be approved by the Judge of this court, he shall be released from custody pending the determination of the writ of error herein assigned.

Done in open court this 25th day of April, 1923.

EDWARD E. CUSHMAN,

Judge.

O. K. as to form.

C. E. HUGHES,

Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington,

Northern Division. Apr. 25, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Recognizance.

United States of America,
Western District of Washington,
Northern Division,—ss.

BE IT REMEMBERED that, on this 26th day of April, 1923, before me, F. M. Harshberger, Clerk of the District Court of the United States within and for the aforementioned court personally appeared Wesley L. Sischo, as principal, and acknowledged himself to owe the United States of America the sum of Ten Thousand (\$10,000.00) Dollars, herewith deposited in said court in Liberty Bonds of the United States, in the principal sum of \$9750.00 and cash in the sum of \$250.00, if default should be made in the following condition, to wit:

The condition of this recognizance is such that, whereas the said Wesley L. Sischo was on the 23d day of April, 1923, sentenced in the above-entitled

cause to pay a fine of four thousand dollars and to serve a term of imprisonment of seven years at McNeil Island; and, whereas, the said defendant has sued out a writ of error to the Circuit Court of Appeals for the Ninth Circuit; and whereas, the Court has fixed the defendant's supersedeas bond to stay execution on said sentence at ten thousand dollars;

Now, therefore, if the said defendant shall prosecute his said writ of error diligently and to effect, and shall obey and abide by and render himself amenable to all orders which said appellate [16] court shall make or order to be made, and shall surrender himself to perform any judgment made and entered by said appellate court, and shall not leave the jurisdiction of this court without leave being first had and obtained, and shall obey and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, and shall, pursuant to any such order, surrender himself, and will obey and perform any judgment of the Circuit Court of Appeals, then this recognizance to be void; otherwise to remain in full force and effect.

WESLEY L. SISCHO.

Taken and acknowledged before me this 26th day of April, 1923.

[Seal U. S. District Court]

F. M. HARSHBERGER,

Clerk United States District Court.

O. K. this April 26th, 1923.

THOMAS P. REVELLE,

United States District Attorney.

CHARLES P. MORIARTY.

Approved:

EDWARD E. CUSHMAN,
Judge.

Acceptance of service of within recognizance
acknowledged this 25 day of April, 1923.

THOS. P. REVELLE,
Attorney for Pltff.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Apr. 26, 1923. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [17]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WESLEY LEROY SISCHO,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that in the trial of this
cause on the 19th day of April, 1923, the above-en-
titled matter came on for trial in the above-entitled
court before the Honorable Edward E. Cushman,
one of the Judges of said Court, sitting with a jury,
the plaintiff appearing by C. E. Hughes and
Charles P. Moriarty, Assistant United States At-
torneys, and the defendant appearing in person and

by John F. Dore and John J. Sullivan, his attorneys; a jury was empaneled and the following proceedings had, to wit:

Testimony of Wesley Leroy Sischo.

On Cross-examination by Mr. MORIARTY.

Q. Were you ever convicted of a crime?

A. Yes, sir, I told about that.

Q. In this court? A. No, not in this court.

Q. In the Federal Court?

A. In the Federal Court, yes, sir.

Q. Before Judge Neterer?

A. Before Judge Neterer.

Q. For this same offense?

Mr. DORE.—I object as incompetent, irrelevant and immaterial; it is improper to ask him that.

The COURT.—Objection sustained. [18]

ARGUMENT TO THE JURY.

Mr. HUGHES (Assistant U. S. Attorney).—A man who served time—

Mr. DORE.—I object to that.

The COURT.—Yes.

Mr. SULLIVAN.—I will ask the Court to instruct the jury to disregard it.

The COURT.—Yes.

Mr. HUGHES.—A man who has been convicted of a felony.

Mr. DORE.—I ask the Court to instruct the jury to disregard that.

The COURT.—As I recall, he said he had been convicted of an offense.

Mr. DORE.—No testimony it was a felony at all.

Mr. HUGHES.—A man who was dealing and selling opium.

Mr. DORE.—I object to that; there is no testimony that he was dealing in and selling opium.

The COURT.—Objection overruled.

CLOSING ARGUMENT.

Mr. MORIARTY.—Are you going to take the word of seven or eight reputable witnesses, or the word of a convict?

Mr. DORE.—“Or take the word of a convict.” I ask your Honor to instruct the jury to disregard that remark.

The COURT.—Motion denied.

JUDGE'S INSTRUCTION.

“I will further instruct you on the weight of evidence and the credibility of witnesses. There has been evidence here that the defendant had incurred a prior conviction. You are not warranted, for that reason, to convict in this case, if you have a reasonable doubt of his guilt in this case. No man should suffer punishment twice for the same offense, if you convict him in this case merely because he has suffered conviction in another case; that is what you would be doing. At the same time the law permits such evidence to be given, where a defendant goes upon the witness-stand; it permits such evidence to be given in order that you may weigh and determine his credit as a witness, because [19] it is only human experience that a man who has been convicted of an offense, in the general average, is not as dependable, and the same reliance is not to be placed upon his statements, either on or off the

witness-stand, as it is in the case of a person who has not suffered such misfortune.”

DANIEL LANDON,

Attorney for Defendant.

Received a copy of the within this 5 day of June, 1923.

THOS. P. REVELLE,

B. E. M.,

Attorney for _____.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Jul. 5, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY LEROY SISCHO,

Defendant.

Order Settling Bill of Exceptions.

NOW, on this 19th day of October, 1923, the above cause came on for hearing on the application of

Wesley Leroy Sischo, the defendant, to settle the bill of exceptions in this cause. Counsel for both parties appeared, and it further appearing to the Court that the time within which to settle and file the bill of exceptions in the foregoing cause has been duly extended, and that said bill as heretofore filed with the clerk is duly and seasonably presented for settlement and allowance, and it further appearing that said bill of exceptions contained all of the material facts occurring upon the trial of the cause, together with the exceptions thereto, and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence; and the Court being duly advised, it is by the Court

ORDERED, that said bill of exceptions be and it hereby is settled as a true bill of exceptions in said cause, [21] and the Clerk of the court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,

United States District Judge.

Received bill of exceptions this — day of July, 1923.

O. K.—DeWOLFE EMORY,

Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY LEROY SISCHO,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following documents and papers in the above cause, and forward them under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a transcript of record in said cause, viz.:

1. Indictment.
2. Arraignment.
3. Plead of not guilty.
4. Verdict.
5. Motion for new trial.
6. Recording of hearing motion for new trial.
7. Judgment and sentence.
8. Petition for writ of error.
9. Assignment of errors.
10. Order allowing writ of error.
11. Appeal bond.
12. Bill of exceptions and order settling same.

13. Writ of error.
14. Citation.
15. Praecipe.
16. Clerk's certificate.

W. E. BARNHART,
Attorney for Wesley Leroy Sischo. [23]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 23, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [24]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY L. SISCHO,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 24, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and

other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 41 folios
at 15¢\$6.15
[25]

Certificate of Clerk to transcript of record,
4 folios at 15¢\$.60
Seal to said certificate..... .20

I hereby certify that the above cost for preparing and certifying record, amounting to \$6.95, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District

Court, at Seattle, in said District, this 1st day of November, 1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western Dis-
trict of Washington. [26]

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 7263.

WESLEY LEROY SISCHO,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error.

To the Honorable Judges of the District Court for
the Western District of Washington, Northern
Division, GREETING:

Because, in the record and proceedings, as also in
the rendition of the judgment in the District
Court before Honorable Edward E. Cushman, be-
tween Wesley Leroy Sischo, plaintiff in Error, and
United States of America, defendant in error, a
manifest error hath happened, to the great dam-
age of the said Wesley Leroy Sischo, plaintiff in
error, as by his complaint appears.

We, being willing that error, if any hath been,
should be duly corrected, and full and speedy jus-
tice done to the party aforesaid in this behalf, DO
COMMAND YOU, if judgment be therein given,
that then under your seal, distinctly and openly,

you send the record and proceedings afore-said, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, within thirty days from the date hereof, to be then and there held, that the record and proceedings afore-said being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs [27] of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, the 19th day of October, 1923.

[Seal]

F. M. HARSHBERGER,
Clerk of the United States District Court for the
Western District of Washington.

Allowed:

EDWARD E. CUSHMAN,
Judge.

Received a copy of the within this 1 day of October, 1923.

THOS. P. REVELLE,
B. E. M.,
Attorney for _____,

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [28]

United States District Court, Western District of
Washington, Northern Division.

No. 7263.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY LEROY SISCHO,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the United States of America, and to THOMAS
P. REVELLE, United States Attorney for the
Western District of Washington, Northern Di-
vision, GREETING:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals for the Ninth Circuit at San Francisco, in
the State of California, within thirty days from
date hereof, pursuant to a writ of error filed in the
Clerk's office of the District Court of the United
States, for the Western District of Washington,
Northern Division, wherein said Wesley Leroy
Sischo, is plaintiff in error, and the United States
of America is defendant in error, to show cause, if
any there be, why judgment in the said writ of
error mentioned should not be corrected and speedy
justice should not be done to the party in that be-
half.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 19th day of October, 1923.

EDWARD E. CUSHMAN,

United States District Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk, United States District Court.

Received a copy of the within this 1 day of October, 1923.

THOS. P. REVELLE,

B. E. M.,

Attorney for _____,

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

[Endorsed]: No. 4131. United States Circuit Court of Appeals for the Ninth Circuit. Wesley Leroy Sischo, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed November 5, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

WESLEY LEROY SISCHO,
Plaintiff in Error,
—VS—

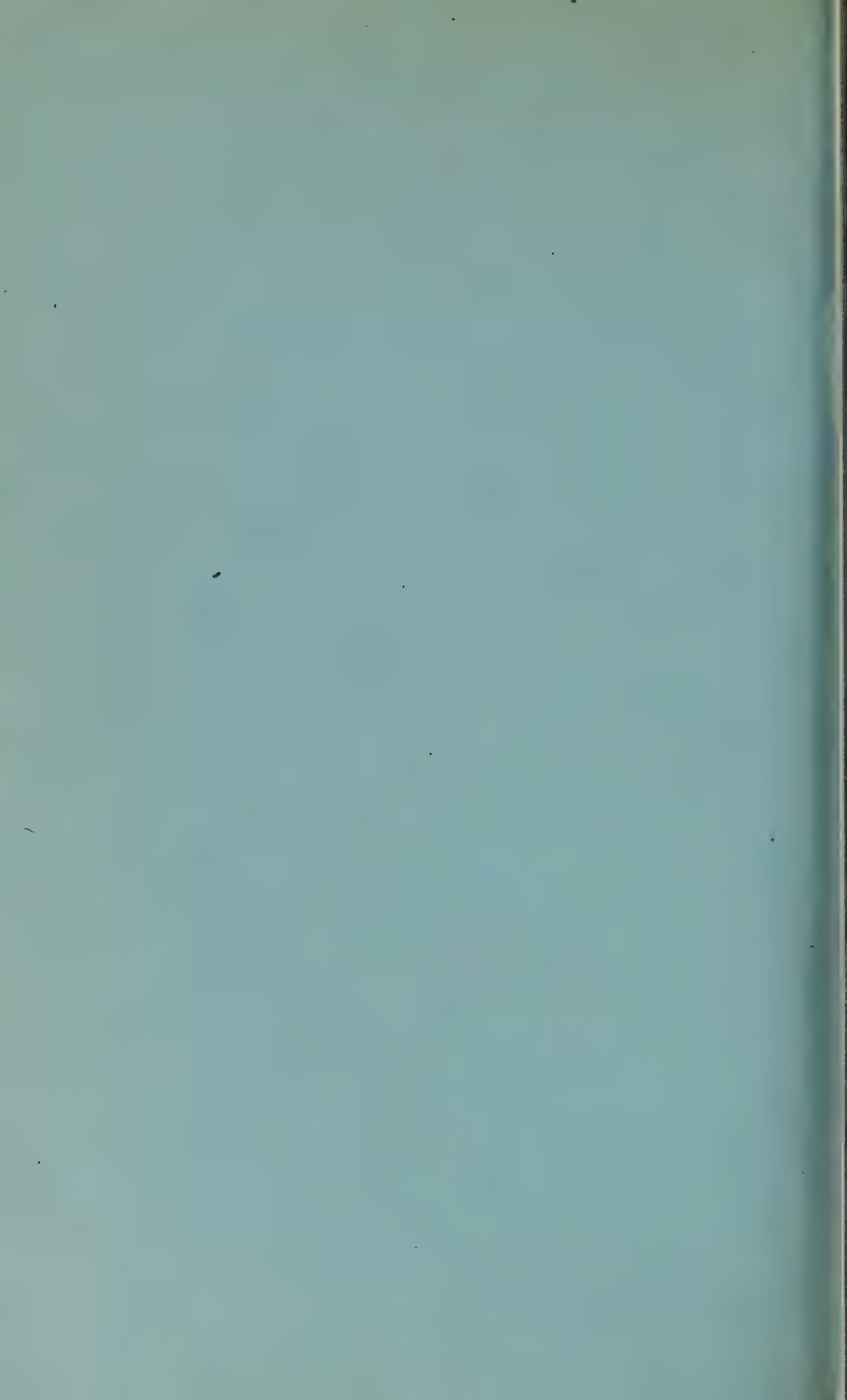
THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Written Error to the United States District
Court of the Western District of Washington,
Northern Division.

HONORABLE EDWARD E. CUSHMAN, Judge

Brief of Wesley LeRoy Sischo, the
Plaintiff in Error

W. E. BARNHART,
Attorney for Wesley Leroy Sischo,
the Plaintiff-in-Error.



No. 4131

United States
Circuit Court of Appeals
For the Ninth Circuit

WESLEY LEROY SISCHO,
Plaintiff in Error,

—VS—

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Wesley LeRoy Sischo, the
Plaintiff in Error

Upon Written Error to the United States District
Court of the Western District of Washington,
Northern Division.

STATEMENT

WESLEY LEROY SISCHO, the Plaintiff-in-Error was charged with the crime of violating the Narcotic Drug Import and Export Act.

The Plaintiff-in Error was tried and found guilty April 20th, 1923; and a motion for a new trial was made and denied (P. R. 6), whereupon the Court sentenced him to seven years imprison-

ment and a fine of Four Thousand Dollars (\$4,000).
Assignment of errors made. (P. R. 12)

This appeal is based upon errors pertaining to the cross examination of Plaintiff-in-Error and arguments made by attorneys for Defendant-in-Error before the Jury.

All the testimony related to the issues herein involved is set in the bill of exceptions and is as follows:

BE IT REMEMBERED that in the trial of this cause on the 19th day of April, 1923, the above entitled court before the Honorable Edward E. Cushman, one of the judges of said Court, sitting with a jury, the plaintiff appearing by C. E. Hughes and Charles P. Moriarty, Assistant United States Attorneys, and the defendant appearing in person and by John F. Dore and John J. Sullivan, his attorneys; a jury was empaneled and the following proceedings had to wit:

TESTIMONY OF WESLEY LEROY SISCHO

On cross-examination by Mr. MORIARTY.

Q. Were you ever convicted of a crime?

A. Yes sir, I told about that.

Q. In this court?

A. No, not in this court.

Q. In the Federal Court?

A. Yes sir.

Q. Before Judge Neterer?

A. Before Judge Neterer.

Q. For this same offence?

Mr. DORE. I object as incompetent, irrelevant and immaterial; it is improper to ask that.

The COURT. Objection sustained.

ARGUMENT TO THE JURY.

Mr. HUGHES (Assistant U. S. Attorney.) A man who served time—

Mr. DORE. I object to that.

The COURT. Yes.

Mr. SULIVAN. I will ask the Court to instruct the jury to disregard it.

The COURT. Yes.

Mr. HUGHES. A man who has been convicted of a felony.

Mr. DORE. I ask the Court to instruct the jury to disregard that.

The COURT. As I recall, he said he had been convicted of an offence.

Mr. DORE. No testimony that it was a felony at all.

Mr. HUGHES. A man who was dealing and selling opium.

Mr. DORE. I object to that; there is no testimony that he was dealing in and selling opium.

The COURT. Objection overruled.

CLOSING ARGUMENT.

Mr. MORIARTY. Are you going to take the word of seven or eight reputable witnesses, or the word of a convict?

Mr. DORE. "Or the word of a convict." I ask your Honor to instruct the jury to disregard that remark.

The COURT. Motion denied.

JUDGE'S INSTRUCTIONS.

"I will further instruct you on the weight of evidence and the credibility of witnesses. There has been evidence here that the defendant had incurred a prior conviction. You are not warranted, for that reason, to convict him in this case, if you have a reasonable doubt of his guilt in this case. No man should suffer punishment twice for the same offence, if you convict him in this case merely because he has suffered conviction in another case; that is what you would be doing. At the same time the law permits such evidence to be given, where a defendant goes upon the witness-stand; it permits such evidence to be given in order that you may weigh and determine his credit as a witness, because it is only human experience that a man who has been convicted of an offence, in the general average, is not dependable, and the same reliance is not to be placed upon his statements, either on or off the

witness-stand, as it is in the case of a person who has not suffered such misfortune.”

ARGUMENT

The record so plainly speaks for itself that little, if anything, can be added by argument.

Not only one, but both counsel for the Government persist in their opening and closing argument before the jury, over objections, in making statements pertinent to the prosecution and wholly outside the evidence admitted.

“A man who has served time. A man who has been convicted of a felony. A man who has been dealing in opium,” says Mr. Hughes in his opening arguments to the jury all over objection of opposing council.

“Are you going to take the word of seven or eight reputable witnesses or the word of a convict?” says Mr. Moriarty in his closing argument to the jury, likewise over the objection of opposing counsels.

It is a well established rule that it is sufficient to reverse a judgment for the court to suffer counsel against objection to state facts pertinent to the issue and not in evidence.

State vs Blodgett 92 Pac. Rep. 820.

Upon the argument the counsel for the State spoke of one of the defendant's witness as a scoundrel, who had served a term in the penitentiary. Held that, as there was no proof to sustain the words, it was a reversible error to refuse appellant's request to have them corrected.

Schlotter vs. State 127 Ind., 493.

The errors of a Judge in matters of law as well as the errors of the jury in matters of fact alike constitute valid grounds for a new trial.

Federal Cases No. 11974-A

Rochell et al vs. Phillips.

As to improper cross-examination of defendant and improper remarks of the United States Attorney, See—

Paquim vs. U. S. 251 Fed. 579-80.

The prosecuting attorney should not be allowed to argue a criminal case to the jury outside of the record.

McCormick vs. the State L. R. A. (N. S.)

1916-F Page 382. Tenn.

The District Attorney made an improper argument not supported by the testimony, which was to the great prejudice of the defendant's rights, and

the Court erred in not arresting the judgment and granting the defendants a new trial.

Latham vs. United States 1916-D L. R. A.
(N. S.) 226 Federal Page 420. See also
Fielding 46 L. R. A. Page 641.

Nothing short of prompt disapprobation by the Court of the improper remarks of the prosecuting attorney in the heat of a trial and clear satisfaction that the injustice thereby done has been remedied can rescue a case from error on appeal or from a new trial on motion of the party against whom it was committed.

Scott vs. State 110 Ala. 48-20 Page 468.
Martin vs. State 63 Miss. 505.

We submit that the record shows the Plaintiff in Error is entitled to a reversal. The argument of counsel being so plainly unwarranted and so improper as to be clearly injurious to the accused.

Respectfully Submitted,

W. E. BARNHART,

Attorney for Plaintiff in Error.



In the United States Circuit Court of Appeals

For the Ninth Circuit

WESLEY LEROY SISCHO,
Plaintiff in Error,

—VS.—

UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DIS-
TRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE E. E. CUSHMAN, *Judge*

BRIEF OF THE DEFENDANT IN ERROR

THOS. P. REVELLE,
United States Attorney.

J. W. HOAR,
Special Assistant United States Attorney.

Office and Post Office Address: 310 Federal Building,
Seattle, Washington

**In the United States
Circuit Court of Appeals**
For the Ninth Circuit

WESLEY LEROY SISCHO,
Plaintiff in Error,

—VS.—

UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DIS-
TRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE E. E. CUSHMAN, *Judge*

BRIEF OF THE DEFENDANT IN ERROR

STATEMENT OF THE CASE.

Wesley L. Sischo, plaintiff in error, but the defendant below (and hereinafter referred to as “defendant”) was tried and convicted under an indictment charging him with violation of the Narcotic

Drugs Import & Export Act, and thereupon, the court sentenced him to seven years' imprisonment and to pay a fine of Four Thousand Dollars.

The evidence on behalf of the Government disclosed that at about 8:30 o'clock in the morning of the 22nd day of November, 1922, at Sylvan Beach, a small dock about ten miles from Seattle, Washington, two boxes were taken from a speed motor boat by the defendant, and were by him delivered to a deck-hand on a certain small freight boat then touching at said dock; that said boxes were billed to Seattle; that upon the delivery of the boxes, the captain of the boat asked the defendant what was in the boxes, and he replied that he had fish in them; that the captain also asked him if he had a couple of cases of "Johnnie Walker" there, and the defendant picked up one of the cases, shook it and said, "It don't rattle;" that after the freight boat left the dock the speed boat was observed to follow at some distance until a point near West Seattle had been reached; that the circumstances surrounding the shipment of these boxes had aroused the suspicions of the captain of the freight boat and he caused an examination to be made en route of the contents of the two boxes, when it was discovered that the boxes contained opium and not fish; that said boxes

were being shipped to one "B. J. Torkelson;" that at some time between Ten and Twelve o'clock of the same forenoon the defendant came to Pier 4 in Seattle, signed the name of "B. J. Torkelson" on the manifest, and paid the freight bill; that defendant was arrested very shortly thereafter, and before he had left the vicinity of the docks; that immediately after his arrest, defendant was identified by the captain, the first mate and one of the deck-hands to be the same individual who loaded the boxes on the boat; that he was also identified by the cashier at Pier 4 as the individual who signed the name of "B. J. Torkelson", and paid the freight due on the shipment; at the trial he was identified by W. D. Covington, a passenger on the boat on the morning in question, to be the individual who brought the boxes to the boat. Mrs. Mary Roth, who lived, approximately, 1500 feet from the defendant, near Harper, Washington, across the water from Sylvan Beach, and had known the defendant, approximately, five or six years, testified that at some time between Seven and Nine o'clock on the morning in question, she saw defendant going toward the beach with a wheelbarrow, hauling, what appeared to resemble, two egg cases. The unusual circumstances surrounding this entire transaction had so im-

pressed themselves upon the minds of the witnesses that their identification of the defendant and his actions was positive.

The defense interposed by the defendant was an alibi; he testified that he had not gone home on the night of the 21st of November, but had remained in Seattle, and registered at a fourth or fifth rate rooming house or a cheap hotel; that on the following morning he was called at Eight o'clock, had gotten up and had taken a street car to West Seattle, then had taken a row boat to go to his motor boat, had gotten the generator out of the motor boat and brought it back to Seattle by street car, and had gone directly to the business establishment of H. G. McLaughlin at 809 Railroad Avenue, arriving there by Nine o'clock; that he had gone from there to Pier 3 to ascertain on which days of the week he could ship freight over to his home; that while on his way to Pier 3, he noticed two customs officers going into Pier 4, and that out of curiosity, thinking that the presence of the officers at Pier 4 indicated that possibly a boat load of liquor had been brought into the harbor, he went into Pier 4 to see if that was a fact; that he had come out of Pier 4 and was going into Pier 3 when he was arrested by the officers. Defendant also admitted that he had had charge of

a motor boat from July, 1922, to November 22, 1922; that the same was a pleasure boat, that he had no special use for it other than carrying a few things back and forth occasionally; that he anchored it at West Seattle for a week at a time. The clerk of the hotel at which the defendant claimed to have stopped on the night of November 21st identified on the hotel register the signature of the defendant, and the fact that a call had been made at the room allotted to defendant at Eight o'clock in the morning. H. G. McLaughlin, the only other witness called by the defendant, testified that he believed the defendant was in his place of business on the morning of the 22nd of November, not later than 8:30 o'clock.

ARGUMENT.

The defendant below rests his claim to a new trial upon certain statements made by counsel for the government in their arguments to the jury.

On cross-examination, defendant admitted that in a Federal Court, he had been previously convicted of a crime.

Thereafter, as his counsel refused to allow further examination into the circumstances surrounding that conviction, defendant must necessarily

stand before the jury with his reputation somewhat affected and with his testimony subject to the closest scrutiny. The fact that counsel spoke of him as a convict could not affect his position in the slightest degree. The jury had seen the witnesses and had heard all of the testimony, and it is not believed that the statements of counsel, only one of which was not corrected by the Court, have in this case affected any substantial right of defendant.

In the case cited by counsel in 92 Pac. Rep. 820, the Court in the sentence immediately following the one from which counsel quotes, the Court said:

“While this states the general rule, yet it must finally rest upon the facts of each particular case as to what matters adverted to but not in evidence are pertinent to the issues, or what immaterial matters referred to may produce injury to the substantial rights of the defendant.”

If any error had been committed by counsel for the government, it was corrected by the instructions of the Court to the jury clearly and forcefully, by that portion cited by counsel for appellant, whereby the rights of the defendant were carefully safeguarded by the Court.

In the case of *Christopoulos v. United States*, 230

Fed. 788, at page 791, par. (4), the Circuit Court said:

“The defendant was a witness in his own behalf and was asked on cross-examination if he ran a ‘blind tiger,’ which implied that he sold liquor unlawfully. The question was allowed over his objection and he was required to answer. In charging the jury the trial court made it plain that this evidence was admitted, not as tending in any wise to prove the offense for which defendant was on trial, but solely, in so far as it involved moral delinquency, as affecting his credibility. For this purpose, to which it was explicitly limited, the evidence was admissible, as this court has recently held in *Fields v. United States*, 221 Fed. 242, 137 C. C. A. 98.”

The same Court adhered to the same ruling in *Krashowitz v. United States*, 282 Fed. 599, at page 600.

The Government contends that the balance of the cases cited by appellant are either not in point or are *obiter dicta* so far as this case is concerned.

Had this case been one purely of circumstantial evidence where the slightest influence might cause a jury to sway one way or the other, and counsel had gone into a lengthy discussion of matters not within the record, then there might be grounds for reversal,

but in this case, as the Court said in his instructions to the jury (Tr. 111):

“The case, as both counsel have argued before you, is one of identity. If you are convinced beyond a reasonable doubt that this accused here was the man that was in possession of this narcotic drug, as has been testified to by certain witnesses, that is sufficient evidence upon which to return a verdict of guilty on both counts; but if you have any reasonable doubt in respect to his identity the defendant is entitled to the benefit of it, and an acquittal.”

It was purely a question of identity. On the side of the Government were four persons, not government employees, but absolutely disinterested persons, who testified positively and without hesitation that on the 22nd day of November, 1922, they saw defendant come from the direction in which he admits he lived and personally deliver on board the freight boat, “Virginia V,” the two boxes containing the opium; in addition, his neighbor saw defendant personally haul two boxes toward the beach at about the same time, and a 6th witness saw him pay the freight on the shipment and sign for it.

As against the direct and positive testimony of the witnesses for the government, the jury had for its consideration, the inconsistent, indefinite, un-

certain and rambling statements of defendant and of his two witnesses who vainly sought to save him from the trouble into which he had gotten himself.

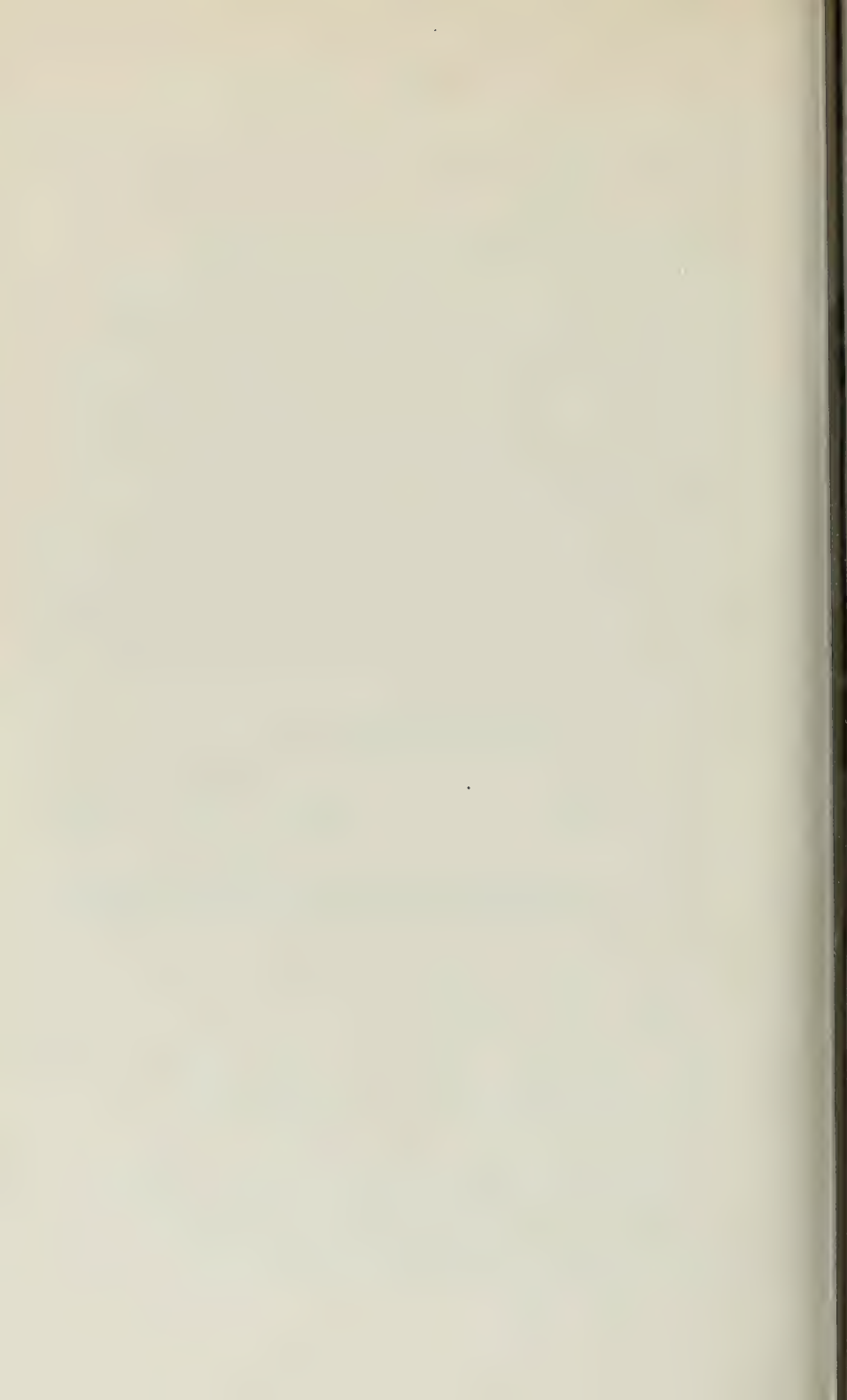
In view of all of the testimony and of the instructions of the Court to the jury, it is hard to conceive that any of the matters complained of, even if for the sake of argument it be admitted that they were errors, could in any way have worked an injustice to the defendant in this action.

The Government submits that the defendant has had a fair and impartial trial herein and that the judgment of the lower court should be affirmed.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney.

J. W. HOAR,
Special Assistant United States Attorney.



In the
United States Circuit Court
of Appeals
For the Ninth Circuit

MASENORI TANAKA,
vs.

Appellant

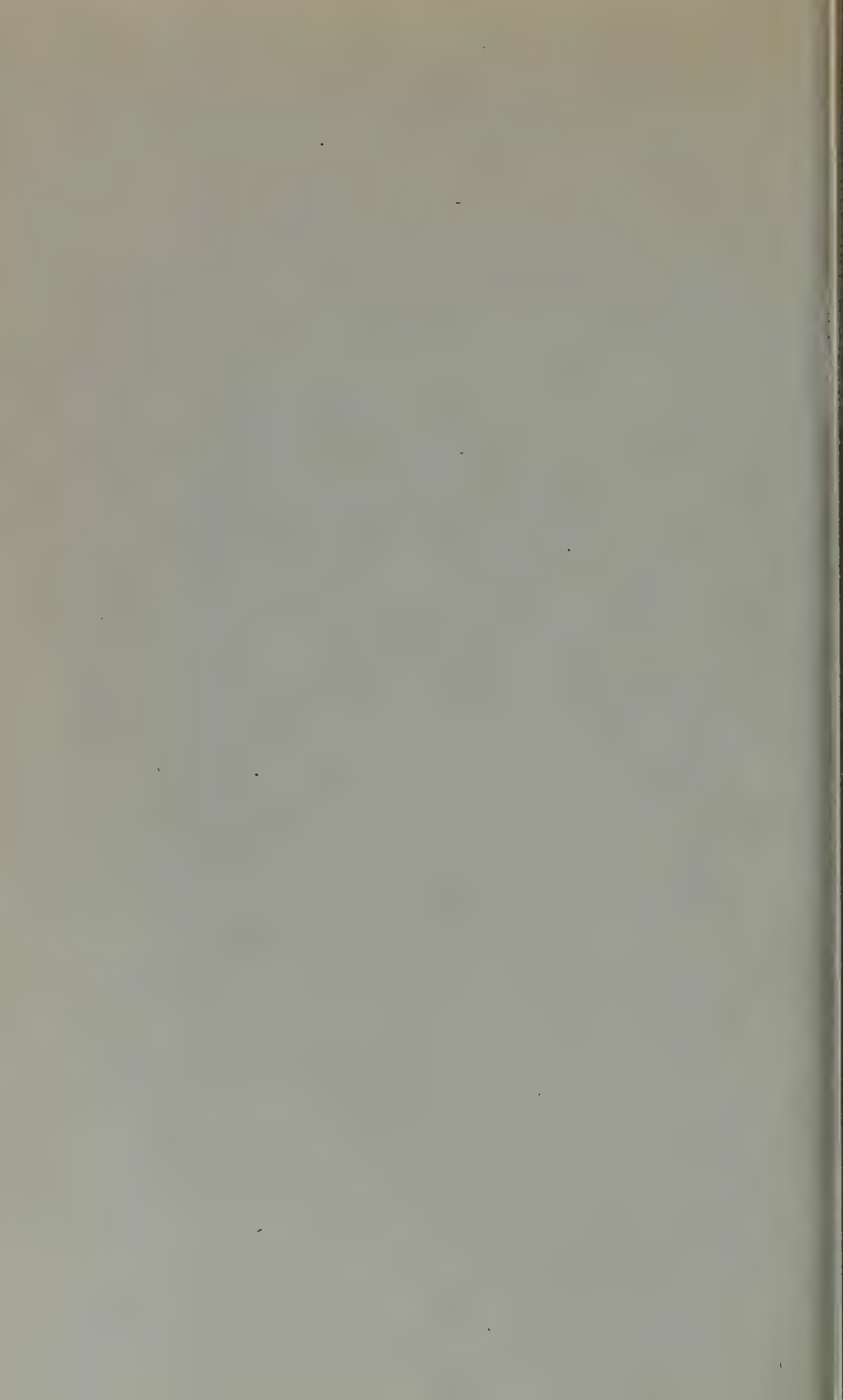
LUTHER WEEDIN, COMMISSIONER OF IM-
MIGRATION,

Appellee

IN THE MATTER OF THE APPLICATION OF
MASENORI TANAKA FOR A WRIT OF HA-
BEAS CORPUS

TRANSCRIPT OF RECORD

UPON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION



No. —

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

MASENORI TANAKA,

Appellant

vs.

LUTHER WEEDIN, COMMISSIONER OF IM-
MIGRATION,

Appellee

IN THE MATTER OF THE APPLICATION OF
MASENORI TANAKA FOR A WRIT OF HA-
BEAS CORPUS

TRANSCRIPT OF RECORD

UPON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION

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**In the District Court of the United States, for
the Western District of Washington, North-
ern Division.**

No. 7800

IN THE MATTER OF THE APPLICATION OF
TANAKA MASENORI, ALIAS TANAKA MASA-
TOKU, A JAPANESE ALIEN, FOR A WRIT OF
HABEAS CORPUS

vs.

LUTHER WEEDIN, COMMISSIONER OF IM-
MIGRATION AT SEATTLE

Names and Addresses of Counsel

WINTER S. MARTIN, ESQ., *Attorney for Peti-
tioner and Appellant.*

2014 L. C. Smith Building, Seattle, Washington.

THOMAS, P. REVELLE, United States Attorney,
Attorney for Respondent and Appellee,

310 Federal Building, Seattle, Washington.

DEWOLFE, EMORY, Asst. United States Attorney,
Attorney for Respondent and Appellee,

310 Federal Building, Seattle, Washington.

**United States District Court, Western District
of Washington, Northern Division**

No. 7800

IN THE MATTER OF THE APPLICATION OF
TANAKA MASENORI, ALIAS TANAKA MASA-
TOKU, A JAPANESE ALIEN, FOR A WRIT OF
HABEAS CORPUS,

vs.

LUTHER WEEDIN, COMMISSIONER OF IM-
MIGRATION AT SEATTLE

Petition for Writ of Habeas Corpus

The petition of Tanaka Masenori, alias Tanaka Masatoku, a Japanese alien, now at Seattle, within the said division and district, respectfully shows to the Court:

I.

That your petitioner is a citizen and subject of the Empire of Japan, who commenced to follow the sea as a vocation in the year 1911 on Japanese vessels. That shortly thereafter he received a Japanese seaman's book, or Kaintechno, which was fur-

nished to him by the Japanese authorities under Seaman's Act No. 47, promulgated March 8th, 1899. That for one year prior to the entry hereinafter mentioned he was employed as a duly authorized and articted seaman on board the Japanese Steamship "Africa Maru."

II.

That on October 13th, 1918, at Tacoma, Washington, the United States Immigration Officers issued an alien seaman's card to him in words and figures as follows, to-wit:

“(Page 1)

Form L. Duplicate. No. S/506 UNITED STATES
OF AMERICA.

Alien Seaman's Identification Card issued under Rule 10 of the Immigration Rules and the regulations prescribed by the President in pursuance of the Act of May 22, 1918.

Except in certain specified cases, it is unlawful for an alien seaman to land from any vessel in a United States port or to sail in a vessel from any such port unless in possession of this card, visaed incoming by an Immigrant Inspector and outgoing by a Customs Inspector.

This card will be issued in the first instance to an incoming seaman by an immigration official; to an outgoing seaman by a customs official. It will then be completed by a customs official or an immigration official, as the nature of the case requires, and thereafter will be visaed by an immigration official or a customs official upon each arrival and departure of the holder, respectively. A duplicate of every card issued will be retained in the office of the immigration official in charge at the port of entry or departure.

(See Sec. 10, Executive Order of Aug. 8, 1918, concerning passports and Rule 10, Immigration Rules.)

This card is valid for use only in American ports. The nationality of the holder as given herein is based on his statements and other evidence, but is not conclusive.

(Page 2)

Port of Tacoma, Wash. (Photograph of Masenori or Masatoku Tanaka and left thumb print next follows.)

Name. . Tanaka Masatoku. Nationality . . Japan.
Place of holder's birth . . Kodhiken, Japan. Place

of father's birth, Kochiken, Japan. Place of mother's birth, Kochiken, Japan. If naturalized abroad, where and when . . No. Age 22, on 4/27/18. Height 5 feet 3 inches. Vessel S. S. "Africa M Flag . . Japn. Date of arrival . . 3rd Oct. 1918. Description: Complexion . . Dark. Hair . . Black. Eyes . . Brown. Physical marks or peculiarities . . Mole below the left eye.

(Page 3)

Port of Tacoma, Wash. Oct. 13, 1918.

The person described on page 2 hereof has been examined by me. Having presented satisfactory evidence of his nationality and of his admissibility under the regulations, and having satisfied me that his status under Rule 10 of the Immigration Rules in Division 3, he is hereby granted permission to land in the pursuit of his calling, with the stipulation that this card must be visaed by an Immigrant Inspector on each subsequent arrival of the holder before he is permitted to leave his vessel. (Signed) A. T. Fulton, Immigrant Inspector.

The person described on page 2 hereof has been examined by me, and, having presented satisfactory evidence of his nationality and of his eligibility to depart in accordance with the regulations, he is

hereby granted permission to depart from the port above mentioned, with the stipulation that this card must be visaed by a Customs Inspector on each subsequent departure of the holder before he is permitted to sail. (No signature) Customs Inspector.

Page 4

VISAS

Subsequent Arrivals in the United States.

Port	Date	Vessel	Signature of Immigrant Inspector
------	------	--------	----------------------------------

Seattle	12/31/18	Africa Maru	Tom L. Wyckoff
---------	----------	-------------	----------------

Tacoma	1/ 8/19	"	H. Otto Gerpacher
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Subsequent Departures from the United States.

Port	Date	Vessel	Signature of Customs Inspector
------	------	--------	--------------------------------

Tacoma	1/4/19	Africa Maru	(none) "
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III.

That your petitioner upon his last voyage to the United States entered at the Port of Tacoma, Washington on January 8th as a duly articulated and lawfully authorized and employed seaman on board the said Steamship "Africa Maru."

IV.

That your petitioner upon January 13th, 1919 at the Port of Tacoma aforesaid, while still serving

as a Japanese seaman on board said Japanese steamship "Africa Maru" deserted from said ship and entered the United States.

V.

That since your petitioner's entry on January 13th, 1919, he has remained in the State of Washington continuously until he was arrested at Fairfax within said State by the United States Immigration officers on a warrant issued by the Department of Labor of the United States dated April 10th, 1923, and then and there taken into custody and thereafter to the date hereof unlawfully and illegally held and detained at the Port of Seattle by said Luther Weedin, United States Commissioner of Immigration, and the inspectors and officers under his authority and control at Seattle aforesaid. That the reasons for arrest and deportation given in the warrant were:

"That he (your petitioner) was a person likely to become a public charge at the time of entry, and that he entered in violation of Rule 11 of the Immigration Rules."

VI

That at the time of his entry at Tacoma on January 13th, 1919, your petitioner was in good and sound bodily health, and was not then and there suffering from any disease which would deny him entry into the United States. That at the time of his said entry aforesaid he was employed in the service of the said steamship as a seaman; that he was not destitute, nor without money, nor was he likely to become a public charge, and at no time prior to his entry was he examined by the Immigration officers, to determine whether he was likely to become a public charge, or whether he was capable of sustaining himself, while temporarily ashore in the United States as a seaman. That in truth and in fact your petitioner's status as a lawfully articulated and employed Japanese seaman on board said ship was accepted by the United States Immigration authorities at the Port of Tacoma without question or inquiry. That in truth and in fact at the time of his entry he had been classified as a Japanese seaman and had upon board said ship in the custody of the master or purser his Japanese seaman's card, in which the United States Immigration officials had theretofore on October 13th,

1918, classified him as a seaman. That in truth and in fact your petitioner was not a Japanese laborer, nor did he enter the United States in violation of Rule 11 of the Immigration Rules, nor did he at any time come under the operation or jurisdiction of said Rule 11, and the authority conferred upon the Immigration officers thereunder, but on the contrary your petitioner was a duly articulated and authorized Japanese seaman, whose status as such at and prior to the time of his entry on January 13th, 1919, had been accepted by the United States Immigration authorities.

VII

That notwithstanding that your petitioner deserted his ship and entered the United States without permission of the Immigration officers at Tacoma aforesaid, your petitioner had remained continuously in the State of Washington in said United States from the date of his said entry January 13, 1919 to the 10th day of April, 1923 which term was more than three years from the date of his original entry. That by reason of the premises your petitioner as he verily believes came and now comes under the operation of Section 34 of the Immigra-

tion Act of February 5th, 1917, which is as follows, to-wit:

“That any alien seaman who shall land in a port of the United States contrary to the provisions of this act shall be deemed to be unlawfully in the United States, and shall, at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody and brought before a board of special inquiry for examination as to his qualifications for admission to the United States, and if not admitted said alien seaman shall be deported at the expense of the appropriation for this act as provided in section twenty of this act.”

VIII

That your petitioner is a person of good moral character, who has properly conducted himself while in the United States and is not subject to deportation for any of the causes in the Immigration Act. That there is no foundation in fact for the alleged charges in the warrant that your petitioner is or ever was likely to become a public charge, or that he was a Japanese laborer entered in violation of said Rule 11, but upon the contrary said Luther Weedon, United States Commissioner of Immigra-

tion and the United States Secretary of Labor, and his officers and assistants are claiming the right to deport upon said grounds, when if the warrant were based upon the true facts, to-wit, that your petitioner was a Japanese seaman, he could not be deported, having remained in the country without molestation for a period longer than three years. That by reason of the premises your petitioner is lawfully entitled to remain in the United States. That he has established and acquired by reason of the facts a lawful domicile, which, in the present condition of the Immigration laws, permits him to remain in said United States.

IX

That your petitioner has appealed to the Secretary of Labor at Washington, D. C., for his discharge and for permission to remain in the United States upon the grounds set forth in this application for a Writ of Habeas Corpus. That your petitioner's appeal to the Secretary has been denied, and that pursuant to the order of deportation issued upon said warrant by the United States Immigration authorities, your petitioner will be deported by said Commissioner of Immigration and his subordinate officers, inspectors and assistants at the

Port of Seattle, unless your petitioner be released and discharged upon this application for a writ of habeas corpus. That pending the return of an order to show cause why the writ should not issue your petitioner is liable to deportation, unless said commissioner and his deputies and assistants are restrained and enjoined from deporting your said petitioner and from placing or attempting to place him on board ship for said purpose. That by reason of the premises your petitioner alleges that his arrest, detention and imprisonment is illegal and without authority of law. That a writ of habeas corpus should issue and your petitioner released and discharged from custody.

Wherefore your petitioner prays:

(1) That a Writ of Habeas Corpus may be issued, directed to the Honorable Luther Weedin, Commissioner of Immigration, both of Seattle, within said division and district, and that upon the return of said writ and hearing thereon, your petitioner be discharged from custody and from the said illegal restraint and unlawful arrest.

(2) That an Order to Show Cause may issue forthwith directed to the Honorable Luther Weedin and his officers, deputies and assistants, directing

(3) That pending a hearing upon the application for this writ of habeas corpus, that the said Honorable Luther Weedon, and the United States Immigration Inspectors, officers and assistants, under his authority, be restrained and enjoined from deporting your petitioner from Seattle to the Empire of Japan, or to any other place in the world and from removing your petitioner from the jurisdiction of this Court.

WINTER S. MARTIN,
Attorney for Petitioner.

UNITED STATES OF AMERICA,)
WESTERN DISTRICT OF WASHINGTON,) ss.
NORTHERN DIVISION.)

MASENORI TANAKA, being first duly sworn upon his oath, deposes and says: That he has had interpreted to him the foregoing petition for a writ of habeas corpus in the above entitled cause, knows the contents thereof, and that the statements therein contained are true.

MASENORI TANAKA.

Subscribed and sworn to before me this 10th day
of July, 1923.

(Notary Seal)

WINTER S. MARTIN,
*Notary Public in and for the
State of Washington, residing at
Seattle.*

Indorsed
Filed in the
UNITED STATES DISTRICT COURT
Western District of Washington
Northern Division
July 21, 1923.
F. M. HARSHBERGER, *Clerk.*
By F. L. CROSBY, Jr., *Deputy.*

Order to Show Cause and Restraining Order

This cause coming on to be heard upon the application of the petitioner herein for a Writ of Habeas Corpus, and the Court having read the petition and being fully advised in the premises;

IT IS BY THE COURT ORDERED that Luther Weedin, Commissioner of Immigration at the Port of Seattle, together with divers and sundry the Immigration officers, inspectors, and officials at the Port of Seattle, acting under the authority of the

United States and of said Luther Weedin at the Port of Seattle aforesaid, be and they, and each of them hereby are required to be and appear in the Court Room of the United States District Court at Seattle, Washington in the Post Office Building, on the 30th day of July, 1923, at 10 o'clock in the forenoon of said day, then and there to show cause, if any there be, why the Writ of Habeas Corpus prayed for in the petition filed herein, should not issue in accordance with the prayer of the said petition.

IT IS FURTHER ORDERED that the above named Luther Weedin, Commissioner of Immigration of the United States at the Port of Seattle aforesaid, together with his assistants, deputies, inspectors, employees in the Immigration Service of the United States at Seattle aforesaid, be, and each of them, hereby is enjoined and restrained from removing the petitioner in the above entitled cause, to-wit, one Tanaka Masenori; alias Tanaka Masatoku, from the City of Seattle, and from and out of the jurisdiction of this Court in the above division and district; and from deporting beyond or overseas from the Port of Seattle, the said petitioner in this said cause, pending the hearing and return upon the application for a Writ of Habeas Corpus filed

this day. Petitioner may be enlarged on \$1000 bond conditioned as by law required.

DONE IN OPEN COURT this 23rd day of July, 1923.

JEREMIAH NETERER,

United States District Judge.

Indorsed

Filed in the

UNITED STATES DISTRICT COURT,

Western District of Washington,

Northern Division.

July 23, 1923.

F. M. HARSHBERGER, *Clerk.*

By F. L. CROSBY, Jr., *Deputy.*

Return

To the Honorable Jeremiah Neterer, Judge of the District Court of the United States for the Western District of Washington:

NOW comes the respondent, Luther Weedin, United States Commissioner of Immigration for the District of Washington, with his office at the Port of Seattle, Washington, and for answer and return to the order to show cause entered herein, says that at the time of the service of said order to

show cause and of the petition herein, the said MASENORI or MASATOKU TANAKA was in the custody of this respondent and was held by this respondent for deportation from the United States as an alien person not entitled to admission under the laws of the United States and subject to deportation under the laws of the United States; the said MASENORI or MASATOKU TANAKA having been theretofore arrested and detained by this respondent under a warrant of arrest issued by the Secretary of Labor of the United States and thereafter having been ordered deported by said Secretary of Labor; said order to this respondent being in the form of a warrant of deportation dated June 25, 1923; the said warrant of deportation being in words and figures following:

“WARRANT—DEPORTATION OF ALIEN

UNITED STATES OF AMERICA

Department of Labor

Washington

No.

55225/317

“To Commissioner of Immigration, Seattle, Washington, or to any officer or employe in the U. S. Immigration Service,

“WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector B. E. Gowen, held at Seattle, Washington, I have become satisfied that the alien

“MASENORI (or MASATOKU) TANAKA, alias Y. Nakamura, who landed at the Port of Tacoma, Washington ex SS ‘Africa Maru,’ on the 15th day of Jan. 1919, has been found in the United States in violation of the immigration act of February 5, 1917, to-wit:

“That he was a person likely to become a public charge at the time of his entry; and that he entered in violation of Rule 11 of the Immigration Rules, and may be deported in accordance therewith.

“I, ROBE CARL WHITE, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to Japan the country from whence he came, at the expense of the appropriation ‘Expenses of Regulating Immigration, 1923.’ You are directed to purchase transportation from Seattle, Washington, to his home in Japan at the lowest available rate, payable from above named appropriation. The alien may be permitted to reship foreign, one way, in lieu of deportation,

and such action on his part will be considered a satisfactory compliance with the terms of this warrant. Delivery of the alien and acceptance for deportation will serve to cancel the outstanding release bond. For so doing this shall be your sufficient warrant.

“Witness my hand and seal this 25th day of June, 1923.

“(Signed) ROBE CARL WHITE,

“Acting Secretary of Labor.

“June 27, 1923.”

Respondent hereto attaches copy of the record, order, decision and exhibits, both on the hearing before the Immigration Inspectors at Seattle, Washington, and the record of the submission of said hearing to the Secretary of Labor, which papers are hereby made a part and parcel of this return the same as if copied herein in full.

WHEREFORE, respondent prays that said writ of habeas corpus be denied.

LUTHER WEEDIN,

Commissioner of Immigration.

UNITED STATES OF AMERICA,)
WESTERN DISTRICT OF WASHINGTON,) ss.
NORTHERN DIVISION.)

Luther Weedin, being first duly sworn on oath deposes and says: That he is Commissioner of Immigration, named in the foregoing return; that he has read the said return and knows the contents thereof, and that he believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 28th day of August, 1923.

(Notary Seal)

D. L. YOUNG.

Indorsed
Filed in the
UNITED STATES DISTRICT COURT,
Western District of Washington,
Northern Division.
August. 28, 1923.
F. M. HARSHBERGER, *Clerk*.
By S. E. LEITCH, *Deputy*.

Hearing on Return on Order to Show Cause

Now on this 28th day of August, 1923, this matter comes up for hearing on return on order to show cause herein. Same is argued to the court by coun-

sel for both sides and petition is denied. It is ordered that deportation proceedings be stayed for the period of fifteen (15) days within which time petitioner is to present his petition for appeal and file supersedeas bond in the sum of \$1500.00 dollars, during which period defendant is ordered released on present bond.

Journal No. 11,
Page 377.

Petition for Appeal

*To the Honorable Frank S. Dietrich, United States
District Judge:*

The above named petitioner, Masenori Tanaka, feeling himself aggrieved by the decree made and entered in the above entitled cause on the 28th day of August, A. D. 1923, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco,

California. And desiring to supersede the execution of the decree, petitioner herein tenders bond in the sum of Fifteen Hundred (\$1500) Dollars, pursuant to the order of Court heretofore made and prays that with the allowance of the appeal an order be made superseding the said decree and staying the execution thereof pending the hearing and determination of this said appeal.

WINTER S. MARTIN,
Attorney for Petitioner.

The foregoing petition granted and appeal allowed.

JEREMIAH NETERER,
United States District Judge.

Copy of within petition for appeal received and due service of same acknowledged this eighth day of September, 1923.

DeWOLFE EMORY,
Asst. U. S. Attorney.
Attorney for Plaintiff.

Indorsed
Filed in the
UNITED STATES DISTRICT COURT,
Western District of Washington,
Northern Division.
September 8, 1923.
F. M. HARSHBERGER, *Clerk.*
By S. E. LEITCH, *Deputy.*

Assignment of Errors

And now on this 8th day of September, A. D. 1923, came the petitioner, by his attorney, Winter S. Martin, and says that the decree entered in the above cause upon the 28th day of August, A. D. 1923, is erroneous and unjust to the defendant in the following particulars, to-wit:

I

That as appears by the record in the above cause your petitioner was a Japanese seaman serving on board the steamship "Africa Maru," when he deserted from his ship at Tacoma, Washington, January 4th, 1919. That he possessed at said time and had for a long time prior thereto possessed a Japanese Official's Seaman's card, fixing his status as a seaman subject of the Empire of Japan, and this status of Japanese seaman was recognized by the United States Immigration authorities in October, 1918, when they issued to him at Tacoma, Washington, a Japanese seaman's identification

card, and said card had not been revoked and was in operation and effective as an identification card fixing his status as a Japanese seaman by the United States Immigration authorities in January, 1919, when he deserted his ship as aforesaid. That by reason of the premises he was an alien seaman within the meaning of Section 34 of the Immigration Act of February 5th, 1917, with all of the amendments supplemental thereto, and as such alien seaman could not be deported after he had remained in the United States beyond the full period of three years from the time of entry. That by reason thereof the order denying his petition for a writ of habeas corpus was erroneous and unjust to him.

II

That inasmuch as the Government waived at the hearing upon the petition in the above cause any claim on the part of the Government that the defendant "was a person likely to become a public charge at the time of entry," the Court's ruling and decree that your petitioner, Masenori Tanaka, entered the United States in violation of Rule 11 of the Immigration Rules is erroneous and unwarranted in view of the positive terms of Section 34 of the Immigration Act.

III

That the Court erred in holding that there was any evidence in the record to support the finding that your petitioner entered the United States in violation of Rule 11 of the Immigration Rules.

IV

The Court erred in holding and deciding that your petitioner was a Japanese laborer who had entered the country without a passport and as such was subject to deportation at the time your petitioner's petition was denied.

V

That the Court erred further in holding and deciding that Rule 11 of the Immigration Rules of 1917 and the President's Proclamation referred to therein had any application or binding force whatsoever in view of the record facts in the above cause.

VI

The Court erred in not holding and deciding that your petitioner in the above cause was entitled to a Writ of Habeas Corpus upon the ground that he

was a duly accredited Japanese seaman, who entered the United States at Tacoma, Washington, in January, 1919, and who had continuously remained in the United States during a period of more than three years from the date of his entry and therefore his detention and ordered deportation were erroneous, illegal and without authority of law on the part of the Secretary of Labor, and by reason thereof a Writ of Habeas Corpus should issue for your petitioner's release.

VII

The Court erred in denying the Writ of Habeas Corpus in the above cause upon the facts established by the petition and the return of the United States thereto.

WHEREFORE your petitioner prays that said decree be reversed, and that a Writ of Habeas Corpus be issued in said cause releasing and discharging him from custody and from the illegal restraint complained of in the above entitled cause.

WINTER S. MARTIN,

Attorney for Petitioner.

Copy of within Assignment of Errors received and due service of the same acknowledge this

eighth day of September, 1923.

DEWOLFE EMORY,
Asst. U. S. Attorney.
Attorney for Plaintiff.

Indorsed
Filed in the
UNITED STATES DISTRICT COURT,
Western District of Washington,
Northern Division.

September 8, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

Order Allowing Appeal and Fixing Supersedeas

Considering the foregoing petition this day presented, it is,

ORDERED that an appeal be allowed to Masenori Tanaka, petitioner in above cause, from the decree of the above court denying the Writ of Habeas Corpus entered on the 28th day of August, 1923, in the above entitled and numbered cause, and that said appeal shall be returnable to the Circuit Court of Appeals for the Ninth Circuit, and that, upon the execution of an appeal and supersedeas bond in

the penalty of Fifteen Hundred (\$1500.00) Dollars, said appeal shall operate as a supersedeas of said decree denying the petitioner's application for Writ of Habeas Corpus, and shall suspend the order of deportation heretofore issued by the Department of Labor ordering the United States Commissioner of Immigration at the Port of Seattle, Washington, together with the United States Immigration officers and Inspectors to deport said petitioner;

And that a transcript of record be filed in the United States Circuit Court of Appeals according to law as prayed for.

DONE IN OPEN COURT this 8th day of September, A. D. 1923, at Seattle, Washington.

JEREMIAH NETERER,

United States District Judge.

Indorsed

Filed in the

UNITED STATES DISTRICT COURT,

Western District of Washington,

Northern Division.

September 8, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

Appeal and Supersedeas Bond

KNOW ALL MEN BY THESE PRESENTS:

That we, Masenori Tanaka, as principal, and NATIONAL SURETY COMPANY, a duly authorized surety bonding corporation, as surety, acknowledge ourselves to be jointly indebted to the United States of America, appellee, in the above cause, in the sum of fifteen hundred (\$1500) dollars, conditioned that,

WHEREAS on the 28th day of August, 1923, in the District Court of the United States, for the Western District of Washington in the Northern Division thereof, in a suit depending in that Court wherein Masenori Tanaka was the petitioner for a writ of habeas corpus, and the United States by and through its Commissioner of Immigration at Seattle, Washington, was respondent, numbered on the docket of said Court as 7800, a decree was rendered denying said petitioner's application for a writ of habeas corpus; and the said Masenori Tanaka having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit, and having filed a copy thereof in the office of the Clerk of the Court

to reverse the said decree, and a citation directed to the said appellee citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco in the State of California, on the 7th day of October, A. D. 1923, next

Now if the said Masenori Tanaka shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

MASENORI TANAKA, *Principal.*
(Corporate Seal) NATIONAL SURETY COMPANY,
By RALPH S. STACY,
Resident Vice-President,
Surety.
J. GRANT,
Resident Assistant Secretary.

Approved this 8th day of September, A. D. 1923.

JEREMIAH NETERER,
United States District Judge.

O. K. as to form. DeWOLFE EMORY,
Asst. U. S. Attorney.

Indorsed
Filed in the
UNITED STATES DISTRICT COURT,
Western District of Washington,
Northern Division.

September 8, 1923.

F. M. HARSHBERGER, *Clerk*.

By S. E. LEITCH, *Deputy*.

**Order Enlarging Petitioner on Bail Pending
Appeal and Continuing in Force the
Restraining Order Heretofore Entered**

The petitioner in the above cause having appealed to the Circuit Court of Appeals for the Ninth Circuit, and his appeal having been allowed, and his appeal and supersedeas bond in the sum of Fifteen Hundred (\$1500.00) Dollars having been approved;

IT IS ORDERED that petitioner, Masenori Tanaka, be and he is hereby enlarged pending the final determination of his said appeal.

IT IS FURTHER ORDERED that the restraining order heretofore issued in said cause on July 23rd, 1923, directed to Hon. Luther Weedon, Commissioner of Immigration, at the Port of Seattle, and his assistants and Immigration Inspectors, etc.,

enjoining him and them from deporting or removing the petitioner from the United States or from attempting so to do during the pendency and determination of the petition for a writ of habeas corpus be and it hereby is continued in full force and effect during the pendency of this appeal and its final determination in the said Court of Appeals or Supreme Court, and said Commissioner is hereby enjoined from proceeding under his warrant from the Secretary of Labor, pending the final determination of said appeal, and this order shall stay all deportation proceedings in the Department of Labor against said petitioner pending the final determination of said appeal.

DONE IN OPEN COURT this 8th day of September, 1923.

JEREMIAH NETERER,

United States District Judge.

Copy of within order received and due service of the same acknowledged this eighth day of September, 1923.

DeWOLFE EMORY,

Asst. U. S. Attorney.

Attorney for Plaintiff.

Indorsed
Filed in the
UNITED STATES DISTRICT COURT,
Western District of Washington,
Northern Division.
September 8, 1923.
F. M. HARSHBERGER, *Clerk*.
By S. E. LEITCH, *Deputy*.

Order

Upon the application of the appellant for an order extending the time within which to perfect the appeal in the above cause, the Court having read the stipulation of the parties hereto;

IT IS BY THE COURT ORDERED that the time within which to lodge the appellate record in the office of the clerk of the Circuit Court of Appeals, and to perfect the appeal in said cause as required by law, be and the same hereby is extended for the full period of thirty days from and after the 7th day of October 1923, when the original time within which to file the appellate record in said cause expires.

DONE IN OPEN COURT this 1st day of October, A. D. 1923.

JEREMIAH NETERER, *Judge*.

O. K.
DeWOLFE EMORY,
Asst. U. S. Attorney.

Indorsed
Filed in the
UNITED STATES DISTRICT COURT,
Western District of Washington,
Northern Division.

October 4, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

**Order Transmitting Immigration Record and
Original Stipulation Waiving Cita-
tion on Appeal**

Upon the application of the petitioner for an order transmitting immigration record and original stipulation waiving citation on appeal, the Court having read the stipulation of the parties hereto consenting that the same may be done;

IT IS BY THE COURT ORDERED that the clerk of the above entitled Court transmit with the appellate record in said cause the original file and record of the Department of Labor, covering the deportation proceedings against the petitioner,

which was filed with the respondent's return in the above cause, directly to the clerk of the Circuit Court of Appeals, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record.

The clerk of this Court is further directed to transmit to the Clerk of the Circuit Court of Appeals in said cause the original stipulation of the parties hereto waiving the issuance and service of citation upon appeal. Said original papers to be transmitted as part of the appellate record in said cause.

DONE IN OPEN COURT this 22nd day of October, 1923.

JEREMIAH NETERER,
United States District Judge.

O. K.
DeWOLFE EMORY,
Asst. U. S. Attorney.

Indorsed
Filed in the
UNITED STATES DISTRICT COURT,
Western District of Washington,
Northern Division.

October 22, 1923.

F. M. HARSHBERGER, *Clerk.*
By S. E. LEITCH, *Deputy.*

Stipulation Re the Contents of Appellate Record

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the transcript of record on appeal shall consist of the following papers, and that no others need be included, to-wit:

- (1) Petition for Writ of Habeas Corpus;
- (2) Order to Show Cause and Restraining Order Enjoining the deportation of petitioner from the United States, pending hearing;
- (3) Return of Honorable Commissioner of Immigration to the petitioner;
- (4) Clerk's record hearing upon Order to Show Cause denying Writ and staying proceedings 15 days pending appeal;
- (5) Petition for Appeal;
- (6) Assignment of Errors;
- (7) Order Allowing Appeal and Fixing Supersedeas Bond upon appeal;
- (8) Appeal and Supersedeas Bond;

(9) Order Enlarging Petitioner on bail and continuing restraining order in force pending appeal;

(10) Order Extending Time to file appellate record in the office of the clerk of the Circuit Court of Appeals 30 days from October 7, 1923;

(11) Order directing clerk to send original Department of Labor Record and file covering the deportation proceedings against petitioner to the clerk of the Circuit Court of Appeals in like manner as an original exhibit.

(12) Original waiver of citation on appeal to be sent by the clerk, copy to be included in transcript;

(13) Stipulation as to the appellate record;

(14) Clerk's certificate.

IT IS FURTHER STIPULATED that the caption of the Court and formal parts of the title to each of said papers may be omitted by the clerk and printer in the preparation of the said record upon appeal, and that the Court may make an order directing the transmission of the original Department of Labor record in said cause, which was filed with the Government's return to the petition in said cause, to the clerk of the Circuit Court of Appeals for the Ninth Circuit, and that said original record

and Department of Labor file covering the deportation proceedings against petitioner may be considered on appeal with the record in said cause in lieu of a copy thereof.

IT IS FURTHER STIPULATED that the original stipulation waiving issuance of formal citation may likewise be forwarded to the clerk of the Circuit Court of Appeals as part of the said transcript.

IN WITNESS WHEREOF the parties have hereunto set their hands this 22nd day of October, 1923.

WINTER S. MARTIN,
Attorney for Appellant.

THOS. P. REVELLE,
United States Attorney.

DeWOLFE EMORY,
Asst. U. S. Attorney.
Attorney for Respondent.

Indorsed
Filed in the
UNITED STATES DISTRICT COURT,
Western District of Washington,
Northern Division.
October 22, 1923.
F. M. HARSHBERGER, *Clerk.*
By S. E. LEITCH, *Deputy.*

Waiver of Citation in Error

The parties hereto stipulate that citation to the defendant upon this appeal shall not be necessary in said above entitled cause, the United States agreeing hereby to waive the issuance of citation and service thereof.

The parties hereto further stipulate that the record in the above cause shall be filed and docketed in the office of the clerk of the above Court at San Francisco within thirty days from the date of this stipulation waiving citation; parties hereto agreeing that but for this stipulation citation would have been issued as of this said date.

IT IS FURTHER AGREED AND STIPULATED that whereas the Hon. Frank S. Dietrich fixed the amount of supersedeas in the above cause at Fifteen Hundred (\$1500.00) Dollars and decided that said petitioner should be enlarged pending this appeal upon said petitioner furnishing supersedeas in the sum of Fifteen Hundred (\$1500.00) Dollars with good and sufficient surety; and whereas said Frank S. Dietrich, judge of said Court, being willing that the said cause should be presented upon

appeal to the Circuit Court of Appeals, agreed to allow said appeal, the parties now stipulate that the Hon. Jeremiah Neterer, Judge of the United States District Court for the Western District of Washington sitting in the Northern Division thereof, may allow said appeal and may make all necessary and proper orders touching the matter of supersedeas, approving appeal and supersedeas bond and all other orders that may be necessary in the formal matter of suing out said appeal. The United States and Luther Weedin, Commissioner of Immigration hereby consenting to the allowance of said appeal by the Hon. Jeremiah Neterer, Judge of said Court.

WITNESS our hands at Seattle, Washington this 8th day of September, A. D. 1923.

WINTER S. MARTIN,
Attorney for Petitioner.

THOS. P. REVELLE,
United States Attorney.

DeWOLFE EMORY,
Asst. U. S. Attorney.
Attorneys for Responent.

Copy of within waiver received and due service of the same acknowledged this eighth day of September, 1923.

DeWOLFE EMORY,
Asst. U. S. Attorney.
Attorney for Plaintiff.

Indorsed
Filed in the
UNITED STATES DISTRICT COURT,
Western District of Washington,
Northern Division.

September 8, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

**In the District Court of the United States, for
the Western District of Washington, North-
ern Division.**

No. 7800

IN THE MATTER OF THE APPLICATION OF
TANAKA MASENORI, ALIAS TANAKA MASA-
TOKU, A JAPANESE ALIEN, FOR A WRIT OF
HABEAS CORPUS

vs.

LUTHER WEEDIN, COMMISSIONER OF IM-
MIGRATION AT SEATTLE

**Certificate of Clerk U. S. District Court to
Transcript of Record**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, clerk of the United States
District Court, for the Western District of Wash-
ington, do hereby certify the foregoing printed

pages numbered from 1 to 41, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above entitled cause, as is required by stipulation of counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Western District of Washington.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of counsel for petitioner, for making record, certificate or return, to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to-wit:

Clerk's fee (Sec. 828, R.S. U.S.), for	
making record certificate or return,	
71 folios at 15c -----	\$10.65
Certificate of clerk to transcript of	
record, four folios at 15c-----	.60
Seal to said certificate-----	.20
	<hr/>
	\$11.45

I hereby certify that the above cost for preparing and certifying record amounting to \$11.45, has been paid to me by counsel for petitioner.

I further certify that I hereto attach and herewith transmit the original Waiver of Citation by stipulation in this cause, together with original file and record of the Department of Labor, filed with respondent's return pursuant to order of Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 2nd day of November, 1923.

F. M. HARSHBERGER,

*Clerk United States District Court,
Western District of Washington.*

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

MASENORI TANAKA,

Appellant

vs.

LUTHER WEEDIN, Commissioner of Immigra-
tion,

Appellee

Brief of Appellant

WINTER S. MARTIN

ATTORNEY FOR APPELLANT

2014-15 L. C. SMITH BUILDING

SEATTLE, WASHINGTON

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

MASENORI TANAKA,

Appellant

vs.

LUTHER WEEDIN, Commissioner of Immigration,
Appellee

Brief of Appellant

STATEMENT OF THE CASE

The appellant, petitioner for a writ of habeas corpus in the court below, was arrested by the immigration officers April 10, 1923. Reasons for arrest and deportation given in the department warrant were

“that he (appellant) was a person likely to become a public charge at the time of entry; and that he entered in violation of rule 11 of the immigration rules.”

Appellant deserted from the Japanese steamship “Africa Maru,” while she lay at the Port of Tacoma, January 13, 1919. He did not submit himself for inspection or examination, but simply walked ashore from his ship. At the time of entry and prior thereto since 1911 he had served on board Japanese vessels as seaman and was then and there a duly certified and accredited Japanese seaman who was recognized as such by the United States immigration officers in October, 1918.

Appellant received from the Japanese Government a “Seaman’s Book,” called in thier language *Kaiin Techo* which all Japanese seamen were required to have under the Japanese Seaman’s Act, No. 47, Promulgated March 8, 1899. The Seaman’s Book (*Kaiin Techo*) is in the nature of a passport, or a declaration by the Japanese Government that the Japanese national using it enjoys the status of seaman, his government having officially recognized him as such by its issuance.

Appellant commenced to work as seaman on the steamship “Africa Maru” about one year before

he deserted from his ship and entered the United States. The master of the steamship "Africa Maru" took up his Seaman's Book when he joined his ship and kept it during his period of service on board said vessel.

On October 13, 1918 the United States immigration officers at Tacoma issued an alien seaman's card to him under subdivision 6 of Rule 10, 1917 Rules. Appellant's seaman's United States identification card was kept by the officers of the ship, and was in their possession when he left the vessel in January, 1919. This card and the visae endorsements of the United States officers were as follows:

"(Page 1)

Form L. Duplicate. No. S/506

UNITED STATES OF AMERICA.

"Alien Seaman's Identification Card issued under Rule 10 of the Immigration Rules and the regulations prescribed by the President in pursuance of the Act of May 22, 1918.

"Except in certain specified cases, it is unlawful for an alien seaman to land from any vessel in a United States port or to sail in a vessel from any such port unless in possession of this card, visaed incoming by an Immigrant Inspector and outgoing by a Customs Inspector.

"This card will be issued in the first instance to an incoming seaman by an immigration official; to an outgoing seaman by a customs official. It will then be completed by a customs official or an immigration official, as the nature of the case requires, and thereafter will be visaed by an immigration official or a customs official upon each arrival and departure of the holder, respectively. A duplicate of every card issued will be retained in the office of the immigration official in charge at the port of entry or departure.

"(See Sec. 10, Executive Order of Aug. 8, 1918, concerning passports and Rule 10, Immigration Rules.)

"This card is valid for use only in American ports. The nationality of the holder as given herein is based on his statements and other evidence, but is not conclusive.

"(Page 2)

"Port of Tacoma, Wash. (Photograph of Masenori or Masatoku Tanaka and left thumb print next follows.)

"Name . . O. Tanaka Masatoku. Nationality . . Japan. Place of holder's birth . . Kodhiken, Japan. Place of father's birth, Kochiken, Japan. Place of mother's birth, Kochiken, Japan. If naturalized abroad, where and when? . . No. Age 22, on 4/27/18. Height 5 feet 3 inches. Vessel S. S. "Africa M Flag . . Japn. Date of arrival . . 3rd Oct 1918. Description: Complexion . . Dark. Hair . . Black. Eyes . . Brown. Physical marks or peculiarities . . Mole below the left eye.

“(Page 3)

Port of Tacoma, Wash. Oct. 13, 1918.

“The person described on page 3 hereof has been examined by me. Having presented satisfactory evidence of his nationality and of his admissibility under the regulations, and having satisfied me that his status under Rule 10 of the Immigration Rules is Division 3, he is hereby granted permission to land in the pursuit of his calling, with the stipulation that this card must be visaed by an Immigrant Inspector on each subsequent arrival of the holder before he is permitted to leave his vessel. (Signed) A. T. Fulton, Immigrant Inspector.

“The person described on page 2 hereof has been examined by me, and, having presented satisfactory evidence of his nationality and of his eligibility to depart in accordance with the regulations, he is hereby granted permission to depart from the port above mentioned, with the stipulation that this card must be visaed by a Customs Inspector on each subsequent departure of the holder before he is permitted to sail. (No signature) Customs Inspector.

“(Page 4)

VISAS

“Subsequent arrivals in the United States:

“Port, Seattle. Date, 12 31/18. Vessel, Africa Maru. Signature of Immigrant Inspector, Tom L. Wyckoff.

“Port, Tacoma. Date, 1/8/19. Vessel, Africa Maru. Signature of Immigrant Inspector, H. Otto Gerpacher.

“Subsequent Departures from the United States:

“Port, Tacoma. Date, 1/4/19. Vessel, Africa Maru. Signature of Customs Inspector, (none).”

Appellant was in good health at time of entry. He was passed by the medical officers of the United States when the ship arrived. When the United States Immigration Service identification card was issued to him, viz, exhibit “C,” attached to the record, Tanaka was not examined as to how much money he had then in his possession, nor as to his ability to sustain himself during the period of temporary residence accorded to an alien seaman under our laws before shipping out of the country, nor did the officials of the United States interrogate him upon this subject at any time after the steamship Africa Maru arrived in the United States from Japan. He was not examined as to whether he had a passport under the requirements of Rule 11 and no claim was made by the immigration authorities that this question entered into his case before the warrant was issued in 1923 in April. Note in the record:

“Q. That being so, Mr. Gowen, there was of course no question raised at that time of the two grounds mentioned in this warrant; that is to say, your Department did not, so far as appears from

your records, raise the point that he was here without a passport in violation of Rule 11, nor that he was then a person likely to become a public charge?

"A. As long as he remained a seaman, these questions were not raised.

"Q. He would not, in immigration practice, be arrested as long as he continued on the ship as a seaman, in the due administration of your work at this port?

"A. Certainly not, in the ordinary procedure of immigration officials.

"Q. And it is only now, Mr. Gowen, that having deserted, I suppose that your contention is that having lost his status as a seaman he is now in the position of one who entered without a passport?

"A. Having forsaken the calling of seaman he is no longer entitled to the exemption accorded seamen."

From the express language in and endorsements upon the identification card, exhibit "C," it appears that Tanaka was admitted to the United States as a seaman and given authority to land, although this authority, or permission, was probably withheld by the master of the steamship Africa Maru. See the terms of the card, exhibit "C," viz, page 3:

"and having satisfied me that his status under rule 10 of the Immigration Rules is Division 3, he is hereby granted permission to land in the pursuit of his calling with the stipulation that this card must

be visaed by an Immigration Inspector on each subsequent arrival of the holder before he is permitted to leave his vessel."

Signed A. T. Fulton, Immigration Inspector.

Note the latest endorsement signed by "H. Otto Gerpacher—Tacoma 1/4/19."

The record shows the admission to land under the endorsement of Gerpacher, inspector, dated January 4, 1919, and that desertion occurred on the 13th.

From these facts the recognized legal status of Tanaka as a seaman subject of Japan appears conclusively by,

1. His Japanese seaman's card,
2. His service on the ship which brought him here,
3. His alien seaman's identification card issued by the United States immigration authorities.

The government officers will not contend to the contrary.

Appellant remained continuously in the State of Washington from date of entry until his arrest in a lumber camp in April, 1923.

At the hearing before the immigration officers the department waived the claim that appellant

“was a person likely to become a public charge at the time of entry,”

and rested its case squarely upon appellant’s alleged

“violation of Rule 11 of the Immigration Rules (1917).”

Relief was denied in the department and the appellant filed his petition for a writ in the District Court at Seattle. At the hearing before Judge Deitrich sitting in the absence of our local judges, the United States attorney waived the public charge element and based his case on the supposed violation of Rule 11. The single issue in the case is whether the appellant’s case, in view of the above facts comes within the protection of Rule 34, which provides for arrest and deportation within three years. Appellant had resided in the State of Washington continuously for four years and three months and had not committed any deportable offense, other than as the facts above can afford ground for deportation notwithstanding the terms of section 34 of the Immigration Act of 1917.

SPECIFICATION OF ERRORS

Seven assignments of error are set out in the record but only one question is raised, viz, was

appellant entitled to his discharge or should he be deported. The District Court denied the writ.

ARGUMENT

The District Court did not write an opinion. All we have in this case is the court's order denying the writ. The decision of the lower court was based upon *Ono v. U. S.*, 267 Fed. 359, as that case arose in this circuit and appeared to be about the only case where Rule 11 has been considered.

We have not had an opportunity to examine the record in the *Ono* case but respectfully urge that this court should re-examine the question in view of the very definite status of seaman established in this case, for it is our contention that Rule 11 has nothing to do with this case at all. It is said in the *Ono* case that the Japanese deserted his ship without a passport. Here the appellant had a passport or its equivalent. He was a duly accredited seaman who had been recognized as such by our immigration officers when they issued to him the alien seaman's identification card. His entry was neither surreptitious nor clandestine except that he escaped from his ship probably in violation of the master's orders. He had been given permission to land as a

Japanese seaman by the United States immigration officers, and his entry could only be called clandestine or secret because he did not again ask permission but simply entered as he had the right to do by the very terms of his seaman's card. What the master of the Japanese ship did in denying him the right to go ashore, and in taking up his card had no bearing upon his status as a seaman who had been given permission to land by our officers. This clearly distinguishes the *Ono* case from the case at bar.

We call the court's attention to the provisions in section 34 of the Immigration Act of February 5, 1917, which reads as follows, to-wit:

"That any alien seaman who shall land in a port of the United States contrary to the provisions of this act shall be deemed to be unlawfully in the United States, and shall, at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody and brought before a board of special inquiry for examination as to his qualifications for admission to the United States, and if not admitted said alien seaman shall be deported at the expense of the appropriation for this act as provided in section twenty of this act."

Rule 10 makes provision for the enforcement of the immigration laws in the case of alien seamen. Subdivision 1 defines seamen. If there were any doubt as to whether or not the term laborer is broad

enough to include seamen within its meaning, the case of *Ellis v. United States*, 206 U. S. 246, 51 L. Ed. 1047, removes any such possible contention by squarely holding that laborers and mechanics are not included within the meaning of the term seamen. By the terms of subdivision 1,

“Only aliens who come within such definition shall be treated in the special manner herein specified. The cases of all others shall be handled in accordance with the general requirements of the Immigration Act, and of other Immigration Rules herewith promulgated, all in accordance with the treaty, laws and rules governing the admission of Chinese.”

The clear intention of the Department is to exclude all aliens except alien seamen from the operation of Rule 10 and section 34, or stating it affirmatively, it is the expressed intention under this rule to classify and treat seamen under section 34 and Rule 10 in a manner wholly different from other aliens. Rule 11 relates wholly and solely to unpassported laborers, clearly distinguishing them from seamen who come under different provisions of the law. *Ellis v. United States*, *supra*, makes clear the distinction between deck hands and ship laborers on the one hand and ordinary laborers on the other. Subdivision 3 makes provision for listing, register-

ing and identifying the same. Under sub-paragraph "d" of subdivision 3, provision is made for a report to the Department of desertions among the seamen. Sub-paragraph "e" of this same subdivision provides for the registration card, one of which was given to the alien in the instant case. By the terms of this sub-paragraph, a complete description of the man is required. His status as a seaman is defined and set out. It is the intention of the Department under this subdivision of Rule 10 that the seaman shall have this card to enable him to go about at will in the seaports of the United States. Subdivision "f" prohibits his landing without registration and the issuance of this card.

Under subdivision 4 provision is made for the immediate medical examination of an alien seaman when his ship arrives at the port of entry. At the outset if he is found to be afflicted with mental defects or physical disease as would mandatorily prohibit his entry under section 3 of the Immigration Act, he is not permitted to land, but must be detained on board or placed in a hospital in accordance with sections 32 and 35.

Subdivision 5 of Rule 10 provides that a certain class of seamen shall in no circumstances be permitted to land permanently in a port of the United

States. Provision is made under this subdivision for his support, maintenance and hospital treatment upon ship-board or ashore in order that he may be cared for in a humane manner.

Subdivision 6 covers his primary immigration inspection, under which he is classified as being in one of three divisions for identification purposes.

Subdivision 8 defines the office of identification card, and subdivision 9 provides for the arrest of violators and their subsequent deportation for violation of the immigration law and rules under section 34.

In *United States v. Jamieson*, 185 Fed. 165, a Chinese seaman, who was a member of the crew of a vessel calling at the Port of New York was held not to be a laborer so as to charge the master of a vessel with knowingly attempting to land a Chinese laborer.

Taylor v. U. S., 207 U. S. 120, 52 L. Ed. 130, makes it clear that deserting seamen are not in the class of aliens, who, if they escaped from their ship, place responsibility upon the ship or her officers for an unlawful landing. The United States Supreme Court in this case reversed the Circuit Court of Appeals in the Second Circuit following the dissenting opinion in that court of Judge Wallace. Note

the following pertinent observation by Judge Wallace in the dissenting opinion:

“Section 2 is devoted to a preliminary enumeration of the classes of aliens who ‘shall be excluded from admission into the United States.’ This enumeration is somewhat more in detail than that contemplated by the provisions of section 13, but does not necessarily include any aliens who do not come intending to reside in the United States, and does not mention sailors. There is not a provision in the act which indicates any intention to embrace sailors in the classes of aliens to be excluded, otherwise than by the mere use of the term ‘aliens.’ Many of the provisions in which the classes are referred to by this comprehensive term are such as would be absurd, if they were intended to apply to sailors. Section 13 is an illustration, and it can hardly be seriously argued that here Congress intended to require the master of the vessel to give each seaman a ticket to identify himself and his family, and then to require the master to swear that he believes that no one of his sailors is an idiot or a prostitute.

“These considerations would suffice to lead to the conclusion that section 16 does not by reasonable construction include sailors under the general term ‘any aliens’; but they are reinforced because at the time of the enactment it was perfectly well understood that the alien exclusion laws did not apply to sailors. This had been so decided in *United States v. Sandrey*, (C. C.) 48 Fed. 550, and in *United States v. Burke*, (C. C.) 99 Fed. 895.

“In the latter of these cases the court said :

“ ‘These statutes do not contemplate the exclusion of crews of vessels which lawfully trade in our ports, and they do not, in spirit or in letter, apply to seamen engaged in either calling, whose home is on the sea, who are here today and gone tomorrow, who come on a vessel into the United States with no purpose to reside therein, but with the intention when they come of leaving again on that or some other vessel, for the port of shipment or some other foreign port in the course of her trade. To hold that these statutes apply to aliens comprising the bona fide crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious injuries to commerce.’

“The attorney general of the United States had formulated an opinion on the subject to the same effect, and had so advised that department of the government charged with the administration of the alien exclusion laws. He said :

“ ‘That, although it was true that Congress had not excepted them (seamen) from the express language of these statutes, in the practical administration of these laws they have always been excepted, and their inclusion in the class of alien immigrants would lead to consequences so destructive to legitimate commerce, that such inclusion could fairly be regarded as beyond the intention of Congress.’

“In view of the decisions of the federal courts whenever the question had been presented, the opin-

ion of the chief law officer of the government, and the construction which had been placed upon the pre-existing legislation by the administrative officers of the government, the circumstances that in the revision no change was made specifically enlarging the class of prohibited aliens so as to include sailors, is significant that Congress had no intention of including them."

See, also, the case of *United States v. Atlantic Transport Company*, 188 Fed. 42. Horsemen engaged to look after horses brought into this country on ship-board were in this case classified as seamen under the Immigration Acts. If the term "seamen" is to be defined as clearly intended in the act and as clearly provided for in Rule 10, and if these decisions above referred to mean anything, it is clear that Rule 11, which refers to laborers entering the country without a passport has no application in the instant case. Masenori Tanaka did not come under the operation of Rule 11. His status as a passported or non-passported alien laborer was never at any time taken into consideration nor suggested by the record until the formal charge was written into the warrant for deportation in April, 1923, four years and three months after his entry. Clearly he can not in these circumstances be regarded in law and at this late date charged as entering the country as an alien laborer without a passport

in violation of the President's Proclamation and Rule 11, nor can he by any stretch of reasoning be regarded at this late day as an alien who was likely to become a public charge at the time he entered, and that by reason of this likelihood he is now subject to deportation. He was never at any time subjected to examination under section 3 as an entering alien. His status as such from the standpoint of his becoming a public charge was never at any time discussed or ever thought of. He was classified arbitrarily under division 3 in the Immigration card divisions, which merely classified him as a person not entitled to enter the United States permanently. By the very terms of this card he was, however, classified as a seaman with the right to temporarily enter and remain in the United States. By the clear terms of section 34 he should have been apprehended and deported within three years from the date of his unlawful entry into the United States as a seaman. He can not be deported for the reason that the deportable limit mentioned by section 34 has been reached and passed. Any construction contrary to this must rest upon purely arbitrary considerations, and not upon the established rights of the alien under section 34 and Rule 10.

We respectfully urge in view of these points raised that there is no authority at this time under the law for the deportation of Masenori Tanaka for any of the reasons or causes mentioned in the warrant and that by reason of the premises the present deportation proceeding should be dismissed and the alien released from custody under a writ of habeas corpus which should be ordered by this court.

We respectfully invite the court's attention to the language of the two proclamations which are set out at length in the *Ono* case at 267 Fed. page 362. They differ from each other in that the later proclamation by President Taft eliminates the words "Japan, Korea, Mexico, Canada and Hawaii" from the text. In its modified form it might refer to any foreign government, who had been issuing passports to places other than the continental United States, and whose passports so issued were being used to enter the United States. The only difference is that the later one eliminates the language found to be objectionable by Japan in the earlier one. Inasmuch as the modified proclamation by President Taft contains the same language as the earlier one in the part that we wish to comment upon, we shall refer to the present existing proclamation which has made the basis of Rule 11. In the first paragraph of the

proclamation, reference is made to the Act which makes it the duty of the President to refuse to permit citizens of any country from entering the United States upon passports issued by certain foreign governments permitting them to go to countries or places other than continental United States. In the second paragraph it recites that the President is satisfied that certain foreign governments are issuing passports to unskilled laborers to go to places and countries other than the continental territory of the United States, which passports are being used by the holders thereof to enter the continental territory of the United States. With these two paragraphs as a preamble the order was made as follows:

“I hereby order that such alien laborers, skilled or unskilled, be refused permission to enter the continental territory of the United States.”

The phrase “such alien laborers” can only refer to the alien laborers who had received passports to “go to any country other than the United States.” In other words it appeared to Congress and the President that certain countries (including Japan), were issuing passports to its laborers to go to Canada, or Mexico, and that these same passport holders afterwards had used them or were using them to gain admission to the United States. The direct

terms of the order refer to the alien laborers of this class, that is those who had been duly passported to contiguous countries. In fact fairly construed this proclamation does not reach the case of an alien coming to the United States directly from Japan without a passport. By it in clear terms it only reaches those aliens who present themselves to the continental territory of the United States with a Mexican or a Canadian passport. Section 3 of the immigration rules in order to override this obvious objection to the practice of the Department provides as follows:

“If such a laborer applies for admission and presents no passport, it shall be presumed:

“(1) *That when he departed from his own country, he did not possess a passport entitling him to come to the continental territory of the United States; and*

“(2) *That at that time he did possess a passport limited to some country, or place, other than continental United States.*”

By what right does the Department create such a presumption and how can such an arbitrary rule conclusively creating a presumption apply to the instant case, or to any case where the fact is contrary to the presumption? How can the Department say conclusively that a man does not possess one kind of a passport, but does in fact possess

another kind of a passport, when in truth and in fact he has no passport at all, and never intended to go to any other place than the continental United States, and how can these arbitrary presumptions of the Department affect the case of a seaman who is not a laborer, skilled, or otherwise, according to the definition of the United States Supreme Court, and who in fact had no passport at all? If his seaman's card (*Kaiin Techo*), can be considered as a passport, how can any presumption one way or the other be indulged in? The fact that the Department has been driven to the necessity of creating an arbitrary presumption, as appears by the quoted subdivision, shows the weakness of the Department's position in trying to reach laborers who in fact have not been passported at all.

The whole purpose of this arbitrary presumption in the Department of Rule 11, is to create a Japanese exclusion act without the permission of Congress. The Department has made a little Japanese exclusion law of its own in adopting this rule. It was for this reason that we at the outset urged that this whole question, in view of our contentions, should be re-examined by this court. In any event appellant was not smuggled into the United States because he had been given permission to enter the United States by the immigration officers. He was either wholly

without a passport, so that Rule 11, even though there were no expressed statute upon the subject, would have no bearing upon his case by the very terms of the proclamation itself, or he had the equivalent of a passport in which latter event it could not apply. If his *Kaiin Techo* may be considered as the equivalent of a passport, then Rule 11 does not apply, because it was not a passport issued to him for the purpose of going to a country other than continental United States, to-wit, Mexico, or Canada. The weakness of the Department's contention is established when it appears that the appellant was a duly accredited Japanese seaman who had been recognized as such, both by his own country and by our immigration officers. In view of the definition of the Supreme Court of the United States as to what constitutes a seaman, as distinguished from a laborer, together with the definition of a seaman in the rules, and in view of the express provision of section 34 of the Immigration Act, we respectfully urge that the appellant is entitled to be and remain in the United States at least until such time as he may be excluded under a proper law of Congress upon the subject. The writ should be granted.

Respectfully submitted,

WINTER S. MARTIN,

Attorney for Appellant.

**In the United States
Circuit Court of Appeals**
For the Ninth Circuit

MASENORI TANAKA,

Appellant,

—VS.—

LUTHER WEEDIN, Commissioner of Immigration
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

HONORABLE FRANK S. DIETRICH, *Judge*

BRIEF OF APPELLEE

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In the United States Circuit Court of Appeals

For the Ninth Circuit

MASENORI TANAKA,

Appellant,

—VS.—

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Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
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HONORABLE FRANK S. DIETRICH, *Judge*

BRIEF OF APPELLEE

STATEMENT OF FACTS

The Appellant, MASENORI TANAKA, a Japanese alien employed as a seaman on the Japanese steamship "Africa Maru", deserted from the said vessel while she lay at the Port of Tacoma on January 13, 1919. He had formed the intention of deserting before he left the vessel, as is evidenced by the following questions and answers at

his hearing before the Immigration Inspector, which is part of the record on this appeal:

“Q. What led you finally to desert the ship?

A. I just made up my mind a few minutes before I deserted.”

He had at the time of said entry into the United States no passport from his Government entitling him to enter the United States. After his desertion he secured employment in the sawmill at Fairfax, Washington, where he was employed until April, 1923, or for a period of more than four years after his unlawful entry into the United States.

In April, 1923, he was arrested and after a hearing before the Immigration Inspector, the Inspector found the appellant was, at the time of entry, a person likely to become a public charge, and that he entered in violation of rule 11 of the immigration rules, and recommended deportation. An appeal was taken to the Secretary of Labor, who affirmed the findings of the Immigration Inspector and caused a warrant of deportation to issue. An application for a writ of Habeas Corpus was then made, which writ was denied. From the order denying the issuance of the writ this appeal is taken.

Rule 11, above referred to, is as follows:

“Subdivision I. *President's proclamation.*
—The President's proclamation on this subject, issued February 24, 1913, reads as follows:

Whereas by the act entitled “An act to regulate the immigration of aliens into the United States,” approved February 20, 1907, whenever the President is satisfied that passports issued by any foreign Government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, it is made the duty of the President to refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such country or from such insular possession or from the Canal Zone;

And whereas, upon sufficient evidence produced before me by the Department of Commerce and Labor, I am satisfied that passports issued by certain foreign Governments to their citizens or subjects who are laborers, skilled or unskilled, to proceed to countries or places other than the continental territory of the United States are being used for the purpose of enabling the holders thereof to come to the continental territory of the United States to the detriment of labor conditions therein;

I hereby order that such alien laborers, skilled or unskilled, be refused permission to enter the continental territory of the United States.

It is further ordered that the Secretary of Commerce and Labor be, and he hereby is, directed to take, through the Bureau of Immigration and Naturalization, such measures and to make and enforce such rules and regulations as may be necessary to carry this order into effect.

Subdivision 2, *Effect of proclamation*.—The proclamation requires that laborers, skilled or unskilled, who are citizens of a country which grants to its laborers proceeding abroad limited labor passports only, and who present at a continental port a passport entitling them only to admission to countries or places other than continental United States, shall be rejected. It does not in any particular relieve such aliens from examination under the general provisions of the law.

Subd. 3. *Rejection or admission as affected by passport*.—If such a laborer applies for admission and presents no passport, it shall be presumed (1) that when he departed from his own country he did not possess a passport entitling him to come to the continental territory of the United States, and (2) that at that time he did possess a passport limited to some country or place other than continental United States. If he presents a passport entitling him to enter continental United States or not lim-

ited to some country or place other than continental United States, he shall be admitted, unless he belongs to one of the classes excluded by the general provisions of the law. If he presents such a limited passport, but claims that he is not a laborer, skilled or unskilled, proof of such claim shall be required.

Subd. 4. *Right of appeal, etc.*—All laborers excluded under this rule shall be advised not only of their right of appeal where one lies, but also that they may communicate by telegraph or otherwise with any diplomatic or consular officer of their Government, and they shall be afforded opportunity for doing so.

Subd. 5. *Definition of term laborer.*—For practical administrative purposes the term “laborer, skilled and unskilled,” within the meaning of the Executive order of February 24, 1913, shall be taken to refer primarily to persons whose work is essentially physical, or, at least, manual, as farm laborers, street laborers, factory hands, contractors’ men, stablemen, freight handlers, stevedores, miners, and the like; and to persons whose work is less physical, but still manual, and who may be highly skilled, as carpenters, stonemasons, tile setters, painters, blacksmiths, mechanics, tailors, printers, and the like; but shall not be taken to refer to persons whose work is neither distinctly manual nor mechanical, but rather professional, artistic, mercantile, or clerical, as pharmacists, draftsmen, photographers, de-

signers, salesmen, bookkeepers, stenographers, copyists, and the like.

Subd. 6. (Not material).

There had been issued for, but not to, the appellant, an alien seaman's identification card, issued under rule 10 of Immigration Rules, which was introduced as evidence before the Immigration Inspector, and is part of the record on appeal. These cards are never turned over to the seamen but remain in the possession of the captain of the vessel, as in this case, and are for identification purposes in checking the crew on the entry and departure of the vessel, and are not an authority to land, even on the face of the card, except in "pursuit of his calling." Section 32 of the Immigration Act of February 5, 1917, provides that no alien excluded from admission into the United States by any law, convention or treaty of the United States, regulating immigration of aliens and employed on board any vessel arriving in the United States from any foreign port or place, shall ~~not~~ be permitted to land in the United States, except temporarily for medical treatment, or pursuant to regulations prescribed by the Secretary of Labor, providing for the ultimate removal or deportation of such alien from the United States.

There had also been issued to the appellant by the Japanese Government a "Seaman's Book." Kaiin Techo, which, according to the testimony of Horiso Saito, the Japanese Consul at Seattle, is issued to every applicant for position as seaman in Japan, and is a Government document only in the sense that it is issued by the Government, and is not a passport in the ordinary sense of the word, and is a document to identify the holder as a subject of Japan, and as a seaman, and to set forth certain facts concerning his past history, and is not intended as a passport to permit the holder to travel to any port or country. (Page 11 of the Immigration Record, which is part of the record on this appeal).

The appellant, himself, testified that he had no passport; that his seaman's book so-called, was surrendered to the master of each vessel on which he worked, and was returned to him when he left that vessel; that said book was in the possession of the captain of the "Africa Maru" at the time of his desertion. (Page 5 and page 12 of the Immigration Record, which is part of the record on this appeal). This seaman's book, or Kaiin Techo, was not offered in evidence.

ASSIGNMENTS OF ERROR

The appellant waives all assignments of error, and states that only one question is raised, viz., was appellant entitled to his discharge or should he be deported.

ARGUMENT

In determining what appellant says is the only question involved, to-wit: is Masenori Tanaka entitled to his charge or should he be deported, this court must, at the outset, ask the question, "Was the appellant denied a fair and impartial hearing before the Immigration Inspector?" It is nowhere in the brief contended that the hearing was not fair and impartial. If the hearing was fair and impartial, the court is without jurisdiction to consider this appeal.

Chin Yow v. United States, 208 U. S. 11;
Low Wah Suey v. Backus, 225 U. S. 460;
Wallis v. United States, 273 Fed. 509.

Passing to a consideration of the argument of appellant, we find on analysis that it falls under three heads or divisions, though not so expressly stated in the brief. Appellant argues as follows:

I. The case of *Ono v. United States*, 267 Fed. 359, can be distinguished from the case at bar.

II. Section 34 of the Immigration Act of February 5, 1917, creates a three year limitation period for the deportation of alien seamen and appellant is an alien seaman who has been in the United States for more than three years and hence can not be deported.

III. The appellant having no passport at all, Immigration Rule 11 does not apply.

Taking up a consideration of these arguments in their order we find that this case is identical with the case of *Akiro Ono v. United States*, decided by this court on September 7, 1920, and reported in 267 Fed. 359. Ono was a Japanese alien employed as a coal passer on board a vessel from which he deserted at Galveston, Texas, on March 1, 1915, and thereafter remained in the United States, employed as a laborer. At the time of his arrest five years had not elapsed, but more than three years had, since his entry into this country. It was held he was an unskilled laborer and denied the right of entry into the United States, by virtue of the Act of February 20, 1907, and the Presidential proclamations promulgated thereunder and pursuant thereto, and subject, by the provisions of section 19 of the Act of February 5, 1917, to deportation, within five years of his entry.

Appellant seeks to distinguish the *Ono* case on

the ground that the appellant was a seaman, but so was Ono. It appears that Ono was a coal passer and it appears that the appellant was a watchman (page 7, Immigration Record, which is part of the record on this appeal), but both were seamen until they abandoned their calling or occupation for under the terms of the Immigration Act itself (Section One of the Act of February 5, 1917), the term "seaman" as used in the Act shall "include every person signing on the ships articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place."

Appellant argues that he had a passport, and therefore, this case may be distinguished from the *Ono* case, but it clearly appears from the testimony of the appellant, and from that of the Japanese Consul, that he had no passport, and that the so-called seaman's book, or Kaiin Techo, was not a passport, and was not intended as such.

Appellant further contends that the fact that an alien seaman's identification card had been issued by the immigration authorities, distinguishes this case from the *Ono* case. It does not appear whether such a card was issued in the *Ono* case or not; in any event it is immaterial. The card was never

issued to the appellant, but was kept by the captain, as appears from appellant's own testimony (pages 6 and 7 of the Immigration Record, which is part of the record on this appeal). And it appears from Inspector Gowen's statements, in response to questions of appellant's counsel, that these cards are used for checking "out and in" to enable the authorities to detect stowaways or deserters, and the notations of arrivals on the card indicate merely that the individual named on the card was a member of the crew, and not that they were allowed to go ashore (pages 7 and 8 of the Immigration Record, which is part of the record on this appeal). The card itself grants permission to the person named therein to land only in "pursuit of his calling." The appellant had abandoned his calling at the time he landed. He landed with the previously formed intention of deserting his ship and calling, and did so. Similar cards are issued for all seamen, of whatever nationality, but under the express provisions of Section 32 of the Immigration Act of February 5, 1917, referred to *supra*, the appellant was not entitled to land at all.

Clearly, this case cannot be distinguished from the *Ono* case and the decision in the *Ono* case is de-

terminative of the questions raised in the present case.

* * * *

We come now to a consideration of appellant's second argument; namely that deportation proceedings are barred because not brought within three years. Appellant directs the Court's attention to Section 34 of the Immigration Act of February 5, 1917, providing that if an alien seamen shall land in a port of the United States contrary to the provisions of the act he shall be deemed to be unlawfully within the United States, and shall at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody and brought before a board of special inquiry for examination as to his qualifactions for admission to the United States, and if not admitted "SAID ALIEN SEAMAN SHALL BE DEPORTED."

It is conceded that appellant has been in the United States for more than three years, but less than five. It is an alien seaman, and not a *former* alien seaman, to whom the said section applies.

Sections 31 to 36 inclusive of the Immigration Act of February 5, 1917, deal with seamen and the crews of vessels and the limitation in Section 34

clearly refers to the provisions relative to the landing of alien seamen set forth in Sections 31, 32 and 33 of the said Act, and would not apply if the alien seaman had landed in violation of some other provision of the Act. Thus Section 19 provides that any alien who, after being excluded and deported or arrested and deported as a—procurer, or as having been connected with the business of prostitution or importation for prostitution—shall return to and enter the United States—he shall be liable to deportation at any time, there being no five or three year period in such a case. It would not be contended that an alien, coming within the classification referred to, on a showing that he was a *bona fide* seaman, could defeat deportation unless the proceedings were instituted within three years of his return and entry into the United States. The inspector found that the appellant had entered the United States in violation of Rule 11. Rule 11 is a suitable rule and regulation for carrying out the provisions of the sixth proviso of Section 3 of the Act of February 5, 1917, which is identical with the last proviso of Section 1 of the Act of February 20, 1907, which is still in effect. *Ono v. United States, supra*. By the express provision of Section 19 of the Act of February 5, 1917, the appellant

was subject to deportation at any time within five years from the time of his entry. *Ono v. United States, supra*. Therefore the limitation period referred to in Section 34 has no application.

But in any event said Section 34 can have no application to this case for the reason that appellant was not a seaman at the time of his entry into the United States; he was not a seaman at the time of his arrest and hearing or at any intervening time. To contend that the appellant was a seaman during the four years he worked in the lumber camp at Fairfax, Washington, is ridiculous. It does not even appear that he was a timber cruiser. As a matter of fact it appears from his own testimony that he formed the intent to desert his ship and his calling before he landed from the *S. S. Africa Maru* at Tacoma on January 13, 1919. It is true as contended by appellant that a seaman is not a laborer within the purview of the Immigration acts; but when a seaman ceases to be a seaman he is no longer entitled to the rights, privileges and immunities of a seaman. The fact that he was at one time a seaman does not follow him as a protecting cloak no matter what subsequent vocation he may adopt. The whole matter is well stated by

Judge Chatfield in *United States v. Crouch*, 185 Fed. 907:

“The word ‘seaman’ as used in the statute refers to an occupation. That occupation is recognized by the laws and the cases as continuous, and as covering the future, unless it is terminated by something contradictory to a continuation of the professional calling which the word implies. * * * It would seem that the application of the statute should depend upon the purpose for which the landing was made, and that the change from the status of a seaman into that of an immigrant occurs when a person attempts to get into the United States as an immigrant, for the sake of remaining as a resident, and that he should be judged under the immigration laws according to that standard, rather than according to what he had been before he changed his status by forming the new intent.”

It has been uniformly held that even under the “Chinese Exclusion” acts, directed against Chinese laborers, seamen were not excluded, so long as they remained members of the crew; but as soon as they ceased to be seamen they became amenable to the Exclusion Acts.

In Re Moncan, 14 Fed. 44;

In Re Ah Kee, 22 Fed. 519.

The reasoning in the *Moncan* and *Ah Kee* cases

supra is clearly applicable here, and when appellant ceased to be a seaman, he became subject to the provisions of rule 11, *supra*, and it appears affirmatively in this case that before he left his ship he intended to desert, and he left the ship and landed with the intention of becoming a laborer and a resident in the United States, and to that extent this is a stronger case than the *Ono* case, *supra*.

Appellant's own authorities are in entire accord with the reasoning in the *Crouch*, *Moncan* and *Ah Kee* cases, *supra*. Appellant cites only six cases apart from the *Ono* case, which case he seeks to distinguish. These cases are:

Ellis v. United States, 206 U. S. 246;
United States v. Jamieson, 185 Fed. 165;
Taylor v. United States, 207 U. S. 120;
United States v. Sandrey, 48 Fed. 550;
United States v. Burke, 99 Fed. 895;
United States v. Atlantic Transport Company, 188 Fed. 42.

Not a single one of these cases is a *habeas corpus* case. Not one of them involves any question of the status of an alien, as between the Government of the United States and the alien. They were all, except in *Ellis v. United States*, *supra*, cases where the Government was seeking to hold parties for

penalties or head taxes for allowing certain aliens to enter the United States. This is not an action against the captain of the S.S. "Africa Maru", but a case between the alien and the Government, and it is obvious that the situation between the Government and the alien, a deserting seaman, and the situation between the Government and the captain or master of a vessel who regarded the alien as a bona fide seaman is entirely different.

In the Ellis case *supra*, it was held that seamen were not laborers or mechanics within the meaning of an Act prohibiting the working of laborers or mechanics more than eight hours a day on public works and casts no light on the question involved in this case.

In the Jamieson case *supra*, Judge Hand held that a master was not liable to a penalty for bringing a Chinese person into the United States where a Chinese seaman had been permitted to go ashore for temporary purposes while his vessel was in port. But note this language in his decision:

"Of course I do not mean that the entry of a laborer under the guise of a seaman would not exclude him, or that his permanent severance from any ship would not change his character. I am assuming the case of a bona fide seaman, the member of a crew."

In the Taylor case *supra*, it was held that the master of a vessel could not be convicted on a charge of landing or permitting an alien to land at any time or place other than that designated by the Immigration officers, where a sailor deserted on shore leave, there being no showing of bad faith on the part of the master.

In the Sandrey case *supra*, the captain of a vessel was held to be not liable for a penalty in the case of a deserting seaman where the statute provided for a penalty when the master knowingly or negligently landed, or permitted to land, an alien immigrant at any place or time other than that designated by the Immigration officers, it appearing in the case that the captain acted in good faith.

In the Burke case *supra*, it was held that the master was not liable for a penalty for failure to return upon his vessel an immigrant of a prohibited class, where the immigrant was a deserting seaman, and the captain had acted in good faith.

The Atlantic Transport Company case *supra*, strongly supports the Government's position in this case. It was held, as stated by appellant, that horsemen, signed for service on a vessel in caring for horses were seamen, but it also holds that the

company was liable for a head tax under Section One of the Act of February 20, 1907, requiring the payment of a head tax on every alien entering the United States, the reason being that these horsemen were signed only for the voyage over, that when the voyage ended they ceased to be seamen and became aliens who were subject to the head tax, whereas as seamen, they would not have been.

In the opinions of the Attorney General cited by the appellant, the rights of bona fide seamen, and not those of deserting seamen, are discussed.

We conclude, therefore, that Section 34 has no application to a violation of rule 11 or of any sections of the Act of February 5, 1917, other than those referring to the landing of alien seamen. But in any event, it has no application to the appellant, for appellant had formed the intention to desert his vessel and his calling as a seaman before he landed, and certainly he was not a seaman at the time of his arrest and hearing before the Inspector in this case.

* * * * *

Appellant's final contention is that rule 11 and the last proviso of Section One of the Act of February 20, 1907, and the 6th proviso of Section 3 of the Act of February 5, 1917, do not reach the case

of an alien coming to the United States directly from Japan without a passport.

This issue was squarely raised in the Ono case supra, and was decided adversely to the appellant. Japanese without passports cannot lawfully enter the United States. If the appellant herein had applied to the Immigration officials at Tacoma, Washington, for admission to the United States on January 13, 1919, could he have been lawfully admitted to this country? Surely not. He was a laborer and a citizen of a country which grants to its laborers proceeding abroad limited passports only. The record in this case indicates that the appellant had no passport at the time of his arrival in this country. Immigration Rule 11, promulgated pursuant to law and pursuant to the specific direction of the President's Proclamation of February 24, 1913, provides in subdivision 3 of said rule that

“If such a laborer applies for admission and presents no passport, it shall be presumed (1) that when he departed from his own country he did not possess a passport entitling him to come to the continental territory of the United States, and (2) that at that time he did possess a passport limited to some other country or place other than continental United States.”

It is clear, therefore, that appellant herein should

have been, and would have been, excluded, had he applied to the Immigration officers for admission at Tacoma, on January 13, 1919, he being "a member of one or more of the classes *excluded by law*." His exclusion was just as mandatory as it would have been had he been afflicted "with a dangerous contagious disease," or as if he had been a polygamist or an anarchist.

Section 23 of the Immigration Act of February 5, 1917, authorized the Commissioner-General of Immigration to establish such rules and regulations, and to issue from time to time such instructions not inconsistent with law, as he shall deem best calculated for carrying out the provisions of the Immigration Act. Under and by virtue of that authority Rule 11 was promulgated. The construction given to the statute by officials charged with its administration will be upheld by the court unless convincing reason to the contrary is found in the language or purpose of the enactment.

Illinois Surety Co. v. United States, 215 Fed. 334.

We must, therefore, conclude that Rule 11 is applicable to the present case, and that the appellant was properly ordered to be deported.

We have considered and disposed of all of the

arguments advanced by appellant, and attention is again directed to the fact that there can be no question but that the appellant had a fair hearing, and that there is ample evidence in the record to support the Inspector's findings as to the facts. It is respectfully submitted, therefore, that the law authorizes the appellant's deportation, and it is respectfully requested that the appeal be dismissed and the order of the District Court denying the Writ requested, be affirmed.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney.

MATTHEW W. HILL,
Assistant United States Attorney.
Attorneys for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROKIYI TAMBARA,

Appellant,

vs.

LUTHER WEEDIN, as United States Commis-
sioner at the Port of Seattle, Washington,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

FILED
JUN 10 1914
FBI - SEATTLE

No. —

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

IN THE MATTER OF THE PETITION OF
ROKIYI TAMBARA, FOR A WRIT OF
HABEAS CORPUS

TRANSCRIPT UPON APPEAL

FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION

JAMES KIEFER,
Attorney for Appellant.
327 Colman Bldg., Seattle, Wash.

HON. THOS. P. REVELLE,
United States Attorney,
310 Federal Building, Seattle, Washington,

HON. DEWOLFE EMORY,
Assistant United States Attorney,
Attorneys for Appellee.

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**In the District Court of the United States for
the Western District of Washington,
Northern Division**

No. 7845

IN THE MATTER OF THE PETITION OF
ROKIYI TAMBARA, FOR A WRIT OF
HABEAS CORPUS

ROKIYI TAMBARA,

Appellant.

JAMES KIEFER,

Attorney for Appellant.

HON. THOS. P. REVELLE,

United States Attorney,

DEWOLFE EMORY,

Asst. United States Attorney,

Attorneys for Appellee.

Petition for Writ of Habeas Corpus filed August
30, 1923.

Order to Show Cause why Writ of Habeas Corpus
should not issue returnable September 10, 1923.
September 10, 1923, cause continued to September
17, 1923.

September 17, 1923, return of United States Com-
missioner of Immigration to order to show cause
filed.

September 18, 1923, argument and hearing taken under advisement.

September 19, 1923, memorandum decision filed denying writ.

October 11, 1923, order denying writ of habeas corpus filed.

October 11, 1923, petition for appeal fixed;

Order allowing appeal and fixing bond on appeal filed;

Notice of appeal filed;

Assignments of error filed;

Order awarding citation and bond on appeal approved and filed;

October 30, 1923, stipulation and order as to printing and forwarding original exhibits filed.

No. 7845

IN THE MATTER OF THE PETITION OF
ROKIYI TAMBARA, FOR A WRIT OF
HABEAS CORPUS

Petition for Writ of Habeas Corpus

*To the Honorable, the Judges of the Above Entitled
Court:*

The petition of Rokiya Tambara respectfully represents:

I

That he is a subject of the Emperor of Japan.

II

That he resided in the United States for a number of years, and on the 17th day of June, 1923, he returned to the United States on the steamer Iyo Maru after a visit to Japan; that he had a proper passport issued by the proper authorities of the Government of the Empire of Japan; that upon landing he was denied admission to the United

States by the Board of Special Inquiry at the United States Immigration Station in the Port of Seattle, because being slightly deaf the Board of Special Inquiry holding and finding that the petitioner was likely to become a public charge, and thereafter the said Board of Special Inquiry reopened the case and heard further evidence and re-affirmed its former finding, and again denied your petitioner the right to enter the United States upon the same ground.

III

That your petitioner is able bodied, has always been able to earn a good living in the United States during his previous stay here; that it appears in the evidence taken by the Board of Special Inquiry that he is offered employment in two (2) responsible quarters, one of them in a sawmill where he worked for four (4) years before making a visit to Japan, being steadily employed; that it appears from the record at the hearing that the Superintendent of the mill plant where he was formerly employed stands ready to re-employ your petitioner at four (\$4.00) dollars per day, and in addition to that a firm of Japanese merchants in the City of Portland, Oregon, have filed an affidavit in the

proceedings in the Immigration Office, and which is a part of the record, setting up their willingness to employ petitioner at remunerative wages.

IV

That the Board of Special Inquiry had before it no evidence whatever even remotely intending to show that your petitioner's slight deafness would incapacitate him from earning a living, or that he was in the remotest degree likely to become a public charge, but on the contrary the evidence in the record shows conclusively that your petitioner is not suffering with any marked degree of deafness, and that the same would interfere with him earning a living, and said record further shows that your petitioner was able to hear ordinary loud voices, and was able to hear the ticking of a watch held at a reasonable distance from his ears, and your petitioner alleges the fact to be that the Board of Special Inquiry denied your petitioner admission to the United States solely and simply because the examining surgeon certified that your petitioner was deaf and stated in his certificate his conclusion that the deafness would interfere with your petitioner's ability to earn a living, and your petitioner was likely to become a public charge.

V

That your petitioner is in the custody of Luther Weedin, United States Commissioner of Immigration for the Port of Seattle, for deportation on September 4, 1923.

WHEREFORE, your petitioner prays that an order may be made herein requiring said Luther Weedin, United States Commissioner of Immigration for the Port of Seattle, to show cause why a writ of habeas corpus should not be issued herein requiring the said Luther Weedin, as United States Commissioner of Immigration, as aforesaid, to produce your petitioner before this Court, and why your petitioner should not be discharged and allowed to remain in the United States.

ROKIYI TAMBARA,
Petitioner.

United States of America,)
Western District of Washington,) ss.
County of King.)

ROKIYI TAMBARA, being sworn on oath, says: That he has heard the foregoing petition read, knows the contents thereof, and that the facts therein stated are true.

ROKIYI TAMBARA.

Subscribed and sworn to before me this 30th day of August, 1923.

(Seal)

JAMES KIEFER,

*Notary Public in and for the State
of Washington, residing at Seattle.*

Filed in the United States District Court, Western District of Washington, Northern Division, August 30, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

No. 7845

Order to Show Cause

In this cause, the petition of Rokiya Tambara having been presented to the Court,

IT IS BY THE COURT ORDERED, that Luther Weedin, as United States Commissioner of Immigration for the Port of Seattle, in this District, do show cause before this Court, on the 10th day of September, 1923, at the hour of ten (10) o'clock A. M., why a writ of habeas corpus should not issue herein, commanding the said Luther Weedin, as Commissioner as aforesaid, to produce the body of said petitioner before this Court.

Done in open Court, August 30, 1923.

FRANK S. DIETRICH, *Judge.*

Filed in the United States District Court, Western District of Washington, Northern Division, August 30, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

No. 7845

Return

To the Honorable Jeremiah Neterer, Judge of the District Court of the United States for the Western District of Washington:

NOW comes the respondent LUTHER WEEDIN, United States Commissioner of Immigration for the District of Washington, with his office at the Port of Seattle, Washington, and for answer and return to the order to show cause entered herein says, that at the time of the service of said order to show cause and of the petition herein the said ROKIYI TAMBARA was in the custody of said respondent and was held by this respondent for deportation from the United States as an alien person not entitled to admission under the laws of the

United States, and subject to deportation under the laws of the United States; the said ROKIYI TAMBARA having been theretofore detained by this respondent at the time the said ROKIYI TAMBARA arrived in the United States from Japan, the said ROKIYI TAMBARA being a member of a class of persons excluded from admission to the United States at said time, by Section 3 of the Act of February 5, 1917, in this, that he, the said ROKIYI TAMBARA was at said time a person found to be, and certified by the examining surgeon as being, physically defective, such physical defect being of a nature which may affect the ability of said alien to earn a living, and the said ROKIYI TAMBARA then and there being a person likely to become a public charge.

Respondent hereto attached the original records of the Department of Labor, both on the hearing at Seattle and on the submission of the records to the Department at Washington, D. C., which papers are hereby made part and parcel of this Return the same as if copied herein in full.

WHEREFORE, respondent prays that said Writ of Habeas Corpus be denied.

LUTHER WEEDIN,
Commissioner of Immigration.

United States of America,)
Western District of Washington,) ss.
Northern Division.)

LUTHER WEEDIN, being first duly sworn on his oath deposes and says: That he is Commissioner of Immigration named in the foregoing return; that he has read the said return; knows the contents thereof, and that he believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 17th day of September, 1923.

(Notary Seal)

D. L. YOUNG.

Filed in the United States District Court, Western District of Washington, Northern Division, September 17, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

No. 7845

Decision

Filed 10-19-23

James Kiefer, Attorney for the Petitioner.

Thomas P. Revelle, U. S. Attorney, and De Wolfe
Emory, Asst. U. S. Atty.

Attorneys for the United States.

NETERER, District Judge:

The petitioner was denied admission by the Board of Special Inquiry, which was affirmed on appeal by the Sec'y of Labor. A further hearing was granted by the Board, and the former order reaffirmed. He petitions for release on a writ of Habeas Corpus, on the ground that he was denied a fair trial. The petitioner was excluded on the "ground that he is physically defective and a person likely to become a public charge." The testimony shows that the petitioner is partially deaf. The following is in the record:

"This applicant appears to be very deaf. During the hearing it was necessary for the interpreter to speak loudly, directly into applicant's ear, to enable him to understand the questions. He was un-

able to hear the ticking of a watch held within one inch of either ear."

It also appears that:

"It is very difficult for the interpreter to make the applicant understand oral questions, and a part of the questions are propounded to him by writing."

The examining surgeon certifies as follows:

"This is to certify that the above described person has this day been examined and is found to be afflicted with deafness with such a degree as to interfere with his ability to earn a living."

Upon re-hearing it was shown that while the petitioner was in the United States some three or four years ago, that he was employed at \$4.00 per day; that his deafness at that time did not interfere with the work in which he was engaged. There is also an offer in the record by the manager of the Teikoku Co. of Portland, Oregon, to give him "a permanent job, a job that will pay wages sufficient for him to be free and independent."

There is nothing in the record to indicate that the petitioner was not accorded a fair trial, *U. S. v. Williams*, 190 Fed. 897; and that limits the court's jurisdiction, *Chin Yow v. U. S.*, 208 U. S. 11. Sec. 3 of the Immigration Act, Feb. 5, 1917, excluding

aliens, among other things provides: “* * * such physical defect being of a nature which may affect the ability of the alien to earn a living shall be excluded.” The Board was strictly within the provisions of the law. To admit the alien because of the offer of employment is without warrant of law. *Wallis v. U. S.*, 273 Fed. 509; *U. S. v. Williams*, 204 Fed. 844. The writ is denied.

NETERER, *Judge*.

Filed in the United States District Court, Western District of Washington, Northern Division, September 19, 1923.

F. M. HARSHBERGER, *Clerk*.

By S. E. LEITCH, *Deputy*.

No. 7845

Order Denying Writ

This matter having come on regularly this day in its order to be heard on the application of the United States Attorney for an order denying petitioner's application for a writ of habeas corpus herein, said matter having heretofore been presented to the Court orally by James Kiefer, Esquire, attorney for said petitioner, and DeWolfe Emory, Assistant United States Attorney, and the Court having here-

tofore and on to-wit, the 19th day of September, 1923, filed its decision denying the said writ, and being duly advised in the premises, it is hereby

ORDERED that the writ so prayed for be, and the same is hereby, denied and the applicant ROKIYI TAMBARA is remanded into the custody of the Commissioner of Immigration at the Port of Seattle, Washington, for deportation in accordance with a decision of the Secretary of Labor. In event of appeal petitioner may be enlarged on \$1000 bail. Exception allowed.

DONE in open Court this 11th day of October, 1923.

JEREMIAH NETERER, *Judge.*

O. K. as to form, JAS. KIEFER.

Filed in the United States District Court, Western District of Washington, Northern Division, October 11, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

No. 7845

Petition for Appeal

ROKIYI TAMBARA, the petitioner above named, deeming himself aggrieved by the order and judg-

ment entered herein on the 11th day of October, 1923, does hereby appeal from the said order to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript and record of proceedings and papers upon which said order is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

JAMES KIEFER,

Attorney for Petitioner.

Copy of foregoing petition for appeal received, and due service admitted, this 11th day of October, 1923.

DEWOLFE EMORY,

*Asst. U. S. District Attorney for
the Western District of Wash-
ington.*

Filed in the United States District Court, Western District of Washington, Northern Division, October 11, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

No. 7845

Order Allowing Appeal and Fixing Bond

Now, to-wit, on the 11th day of October, 1923,

IT IS ORDERED, that the appeal be allowed as prayed for; and,

IT IS FURTHER ORDERED, that said petitioner, Rokiya Tambara, may at any time pending said appeal be at large upon executing a recognizance or bond to the United States of America, executed by an approved surety company, in the sum of one thousand (\$1000.00) dollars, to the satisfaction of the Clerk of this Court, for his appearance to answer the judgment of the Circuit Court of Appeals, or the judgment of the District Court if the same be affirmed.

JEREMIAH NETERER,

District Judge.

Filed in the United States District Court, Western District of Washington, Northern Division, October 11, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

No. 7845

Notice of Appeal

To Luther Weedin, United States Commissioner of Immigration at the Port of Seattle, Washington, and to the United States of America, and to Thos. P. Revelle, Esq., United States District Attorney for the Western District of Washington:

You, and each of you, are hereby notified that Rokiya Tambara, petitioner above named, hereby and now appeals from that certain order, judgment and decree made herein by the above entitled Court on the 11th day of October, 1923, adjudging, holding, finding and decreeing that a petition of the petitioner for a writ of habeas corpus be dismissed, and that the petitioner be denied and refused a writ of habeas corpus, and adjudging that the petitioner had a fair and impartial trial before the Board of Special Inquiry and that the petitioner be remanded to the custody of Luther Weedin, United States Commissioner of Immigration for the Port of Seattle, Washington, for the carrying out of the sentence of deportation, and from the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES KIEFER,
*Attorney for Rokiya Tambara,
Petitioner and Appellant.*

Copy of foregoing notice of appeal received, and due service admitted, this 11th day of October, 1923.

THOS. P. REVELLE,
*U. S. District Attorney for the
Western District of Washing-
ton. B. K.*

Filed in the United States District Court, Western District of Washington, Northern Division, October 11, 1923.

F. M. HARSHBERGER, *Clerk.*
By S. E. LEITCH, *Deputy.*

No. 7845

Assignments of Error

Comes now the petitioner, Rokiya Tambara, and assigns error in the decision of the said District Court as follows:

I

The Court erred in holding and deciding that the petitioner, Rokiya Tambara, had a fair and impartial trial before the Board of Special Inquiry and before the Secretary of Labor.

II

The Court erred in holding and deciding that a petition for a writ of habeas corpus herein be dismissed, and that the writ of habeas corpus be denied and refused.

III

The Court erred in holding, deciding and adjudging that the petitioner, Rokiya Tambara, be remanded to the custody of Luther Weedon, as United States Commissioner of Immigration for the Port of Seattle, for execution of the order and sentence of deportation.

IV

The Court erred in deciding, holding and adjudging that under the evidence the Board of Special Inquiry and the Secretary of Labor were justified in finding and holding that petitioner, Rokiya Tambara, is afflicted with a physical defect likely to cause him to become a public charge, and in deciding, holding and adjudging that there was evidence in the record justifying such finding and holding by the said Board of Special Inquiry and the Secretary of Labor.

JAMES KIEFER,
Attorney for Rokiya Tambara,
Petitioner and Appellant.

Filed in the United States District Court, Western District of Washington, Northern Division, October 11, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

No. 7845

Citation

United States of America:—ss.

To Luther Weedon, United States Commissioner of Immigration at the Port of Seattle, Washington, and to the United States of America, Greeting:

WHEREAS, Rokiya Tambara has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, order and decree lately on, to-wit, the 11th day of October, 1923, rendered in the District Court of the United States for the Western District of Washington, made in favor of you, adjudging and decreeing that the petition of said Rokiya Tambara for a writ of habeas corpus be dismissed and that the writ of habeas corpus be denied and refused, and has filed the security required by law,

You are therefore cited to appear before the United States Circuit Court of Appeals, in the City of San Francisco, State of California, on the 10th day of November next, to do and receive what may obtain to justice to be done in the premises.

GIVEN under my hand in the City of Seattle, in the Ninth Circuit, this 11th day of October, in the year of our Lord Nineteen Hundred Twenty-three, and of the Independence of the United States the One Hundred Forty-eighth.

JEREMIAH NETERER,
*Judge of the U. S. District Court
for the Western District of Wash-
ington.*

Copy of foregoing citation received, and due service admitted, this 11th day of October, 1923.

THOS. P. REVELLE,
*U. S. District Attorney for the
Western District of Washington.*

Filed in the United States District Court, Western District of Washington, Northern Division, October 11, 1923.

F. M. HARSHBERGER, *Clerk.*
By S. E. LEITCH, *Deputy.*

No. 7845
Appeal Bond

KNOW ALL MEN BY THESE PRESENTS: That we, Rokiya Tambara, as principal, and the National Surety Co., a corporation under the laws of the State of New York and authorized to do, and doing, a surety business in the State of Washington, as surety, are held and firmly bound unto the United States of America in the full and just sum of one thousand (\$1000.00) dollars, to be paid to the United States of America, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of October, in the year of our Lord, Nineteen Hundred Twenty-three.

WHEREAS, lately at a District Court of the United States for the Western District of Washington, Northern Division, in a proceeding pending in said court, to-wit, a petition by the above named principal, Rokiya Tambara, for a writ of habeas corpus directed to Luther Weedon, commanding that he produce the body of said petitioner before the said

District Court, together with the cause of his detention; and

WHEREAS, upon the hearing of the said matter a judgment and decree was made by the said court in said cause denying the said writ of habeas corpus and dismissing the proceeding; and,

WHEREAS, the above named Rokiya Tambara has appealed from said judgment and decree in said habeas corpus proceeding to the United States Circuit Court of Appeals for the Ninth Circuit, and said Rokiya Tambara has obtained a citation directed to the said Luther Weedin, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in said Circuit, on the 10th day of November, 1923;

Now, the condition of this obligation is such, that if the said Rokiya Tambara shall prosecute said appeal to effect and answer all damages and costs, if he fail to make the said plea good, and shall and do in all things comply with and perform the judgment of the United States Circuit Court of Appeals for the Ninth Circuit as well as the judgment of the said District Court, if the same shall be affirmed,

then this obligation to be void, else to remain in full force and effect.

ROKIYI TAMBARA.

By JAMES KIEFER,

His Attorney.

NATIONAL SURETY CO.

By C. B. WHITE,

Attorney in Fact.

Sealed and Delivered in Presence of:

(Seal) O. K.

DEWOLFE EMORY,

Asst. U. S. Atty.

The foregoing bond approved this 11th day of October, 1923.

JEREMIAH NETERER,

Judge United States District Court.

Filed in the United States District Court, Western District of Washington, Northern Division, October 11, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

No. 7845

**Stipulation as to Printing and as to Sending
Up Original Exhibit**

IT IS STIPULATED between the appellant, by his attorney, and the respondent, by his attorney, that in printing the record in this cause that after the first occurrence of the caption it may be omitted and merely the title of the paper and number of the cause may be printed; and that the original record in the office of the Commissioner of Immigration at Seattle, Washington, filed herein September 17, 1923, as a part of the return of the Commissioner of Immigration to the order to show cause, be transmitted to the appellate court as an original exhibit and need not be printed.

Dated October 30, 1923.

JAMES KIEFER,

Attorney for Appellant.

THOS. P. REVELLE,

*United States Attorney and Attorney
for Respondent.*

By DEWOLFE EMORY,

Assistant United States Attorney.

Filed in the United States District Court, Western District of Washington, Northern Division, October 30, 1923.

F. M. HARSHBERGER, *Clerk.*

By S. E. LEITCH, *Deputy.*

No. 7845

Order for Transmission of Original Exhibit

Upon stipulation of counsel, IT IS BY THE COURT ORDERED, AND THE COURT DOES HEREBY ORDER, that the original record in the United States Immigration Office at Seattle, Washington, filed herein as a part of the return of the Commissioner of Immigration to the order to show cause, be transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit as an original exhibit, and that the same need not be printed.

Done in open Court this 30th day of October, 1923.

JEREMIAH NETERER, *Judge.*

O. K. as to form.

DEWOLFE EMORY, *Asst. U. S. Atty.*

By S. E. LEITCH, *Deputy.*

Clerk's Certificate

[illegible]

I, F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing 26 printed pages, 1 to 26, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as same appears upon the record of this cause and appeal, and as the same remain of record and on file in the office of the Clerk of said Court, and that the same constitute the record on appeal from the order, judgment and decree of the District Court of the United States for the Western District of Washington to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that I hereto attach and herewith transmit the original citation in this cause, and the original record in the office of the United States Commissioner of Immigration at Seattle, referred to and made a part of the return of said Commissioner and filed herein September 17, 1923.

I further certify that the cost of preparing the foregoing record on appeal, and printing the same, is the sum of \$44.80, to-wit: \$6.05 Clerk's fees and \$38.75 printing, and that the said sum has been paid by James Kiefer, Attorney for Appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, on this 6th day of November, 1923.

(Seal) F. M. HARSHBERGER,
*Clerk of the United States District
Court for the Western District
of Washington.*

In the United States Circuit Court of Appeals

For the Ninth Circuit

ROKIYI TAMBARA,

Appellant,

—vs.—

LUTHER WEEDIN, as United States Commissioner
of Immigration at the Port of Seattle, Wash-
ington, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT 

THOS. P. REVELLE,

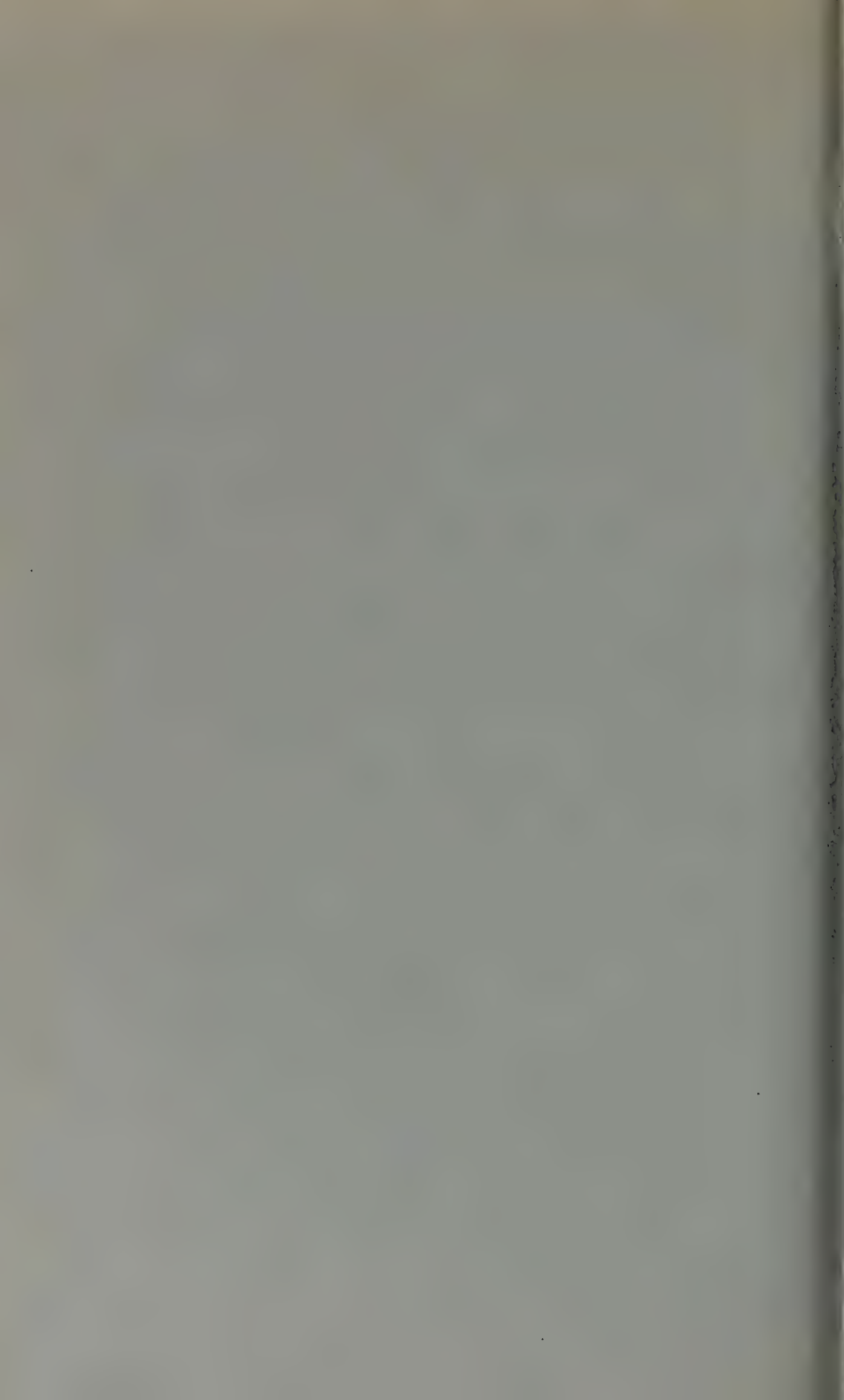
*United States District Attorney for the Western
District of Washington.*

MATTHEW W. HILL,

*Assistant United States District Attorney for the
Western District of Washington.*

Attorneys for Appellee.

310 Federal Building, Seattle, Washington.



In the United States Circuit Court of Appeals

For the Ninth Circuit

ROKIYI TAMBARA,

Appellant,

—vs.—

LUTHER WEEDIN, as United States Commissioner
of Immigration at the Port of Seattle, Wash-
ington,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The applicant ROKIYI TAMBARA, an alien and a native of Japan, sought admission to the United States at the port of Seattle on the 17th day of June, 1923. He is thirty-eight years of age and arrived at this port as a passenger on the S. S.

"Iyo Maru." He was given the usual physical examination by a surgeon of the United States Public Health Service, who on the 19th of June, 1923, certified Rokiya Tambara "to be afflicted with deafness of such a degree as to interfere with his ability to earn a living. It might have been detected by competent medical examination at the port of embarkation." On the same day the alien was given his hearing before the Board of Special Inquiry at Seattle, the only witness examined being the alien. There was before the Board at that time the surgeon's certificate, above referred to, and there appears in the transcript of the testimony before the Board the following note (Record p. 3):

"This applicant appears to be very deaf. During the hearing it was necessary for the interpreter to speak loudly, directly into applicant's ear, to enable him to understand the questions. He was unable to hear the ticking of a watch held within one inch of either ear."

After examining the applicant the Board voted unanimously to exclude him as a person "not comprehended within any of the foregoing excluded classes who is found to be and is certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature

which may affect the ability of such alien to earn a living" (Sec. 3, Act of February 5, 1917). An appeal was thereupon taken by the applicant to the Secretary of Labor, two affidavits also being forwarded for the Secretary's consideration on appeal which were not introduced in evidence before the Board of Special Inquiry. These affidavits are by one Frank Morita and R. Rittenhouse, and are attached to the alien's first brief on appeal and contained in the record attached to the Return of the United States Commissioner of Immigration, which is part of the record on this appeal. The Secretary of Labor in due course affirmed the excluding decision of the Board, and the applicant was thereafter, on the 21st of July, 1923, given permission to re-open the case before the Board of Special Inquiry. Thereafter, on the 30th of July, 1923, the Board proceeded to give the applicant's case further consideration, and an additional affidavit was introduced in evidence and considered by the Board, in addition to further testimony by the alien. The testimony before the Board on this second hearing appears in the Commissioner's Return, and the following notation is contained therein:

"It is very difficult for the interpreter to

make the applicant understand an oral question and a part of the questions were propounded to him by writing."

The affidavit by Robert Rittenhouse, Superintendent of the Clark & Wilson Lumber Company, operating at Linnton, Oregon, is to the effect that the alien was employed by that company from April 23, 1917, to March 24, 1921, and that while his hearing was impaired at that time, it would not seriously interfere with his work in such employment, and that affiant stands ready and willing to give the alien employment, and that the alien is capable of earning Four Dollars a day. It is significant that the affiant added to the typewritten statement in the affidavit, "that his impairment of hearing will not in any way interfere with him in earning a living", the following qualification in his own handwriting: "*while in our employ.*" The affidavit of Frank Morita is to the effect that he is an acquaintance of the alien, and that he knows from his personal acquaintance with him that ~~he~~ the alien, is perfectly able to earn and make a living in this country, and would not become an object of charity, and further, that affiant stands ready to give the alien a permanent job. There is an additional affidavit by Robert

Rittenhouse to the effect that the alien's hearing did not interfere with his work while he was employed by the Clark & Wilson Lumber Company in Oregon.

Upon this record the Board of Special Inquiry for the second time rendered an excluding decision, relying on the terms of Section 3 of the Act of February 5, 1917, above quoted, and the applicant again appealed to the Secretary of Labor, who again affirmed the Board's decision.

The alien made application for a writ of habeas corpus, which application was denied. From the order denying the writ this appeal is prosecuted. The opinion of Judge Neterer, denying the application, is reported in 292 Fed. at page 764.

ASSIGNMENTS OF ERROR

I.

The Court erred in holding and deciding that the petitioner, Rokiya Tambara, had a fair and impartial trial before the Board of Special Inquiry and before the Secretary of Labor.

II.

The Court erred in holding and deciding that a petition for a writ of habeas corpus herein be dis-

missed, and that the writ of habeas corpus be denied and refused.

III.

The Court erred in holding, deciding and adjudging that the petitioner, Rokiya Tambara, be remanded to the custody of Luther Weedon, as United States Commissioner of Immigration for the Port of Seattle, for execution of the order and sentence of deportation.

IV.

The Court erred in deciding, holding and adjudging that under the evidence the Board of Special Inquiry and the Secretary of Labor were justified in finding and holding that petitioner, Rokiya Tambara, is afflicted with a physical defect likely to cause him to become a public charge, and in deciding, holding and adjudging that there was evidence in the record justifying such finding and holding by the said Board of Special Inquiry and the Secretary of Labor.

ARGUMENT

Of these, two assignments only, the first and the fourth need be discussed, as, if there is no merit in either of these two assignments of error, it follows that there is no merit in either the second or

third. And in fact, if on a consideration of the first assignment of error, it is found that the appellant had a fair and impartial trial before the Board of Special Inquiry and before the Secretary of Labor, then neither the court below or this court have any jurisdiction in the premises, as it is only the failure to give the appellant a fair and impartial trial which would give the District Court original jurisdiction and this court appellate jurisdiction.

Chin Yow v. United States, 208 U. S. 11.

We find that the appellant's fourth assignment of error is really the reason relied upon to prove the first assignment of error, and appellant's contention reduces itself to this proposition: Rokiya Tambara did not have a fair and impartial trial before the Board of Special Inquiry because there is no evidence in the record to justify the holding that the petitioner, Rokiya Tambara, is afflicted with a physical defect which may affect his ability to earn a living.

An examination of the record indicates that there was ample evidence to justify the finding of the Board of Special Inquiry and its excluding decision based thereon.

There is the surgeon's certificate to the effect that Rokiya Tambara was "afflicted with deafness

of such a degree as to interfere with his ability to earn a living."

The following is also in the record:

"This applicant appears to be very deaf. During the hearing it was necessary for the interpreter to speak loudly, directly into the applicant's ear, to enable him to understand the questions. He was unable to hear the ticking of a watch held within one inch of either ear."

And further, it appears from the record that,

"It is very difficult for the interpreter to make the applicant understand an oral question, and part of the questions were propounded to him in writing."

The last two quotations from the record answer appellant's contention that the Board of Special Inquiry based its finding solely upon the certificate of the surgeon, and did not give the appellant the benefit of their independent judgment. So the case of *Re Kornmehl*, 87 Fed. 314, relied upon by the appellant is not in point, and in any event it is not contended by the appellant that the Secretary of Labor, to whom the appellant twice appealed his case, did not reach his decision after a consideration of the entire record. A consideration of the statute involved and of the decisions there-

under make it clear that the District Court could not have done other than it did in denying appellant's application for a writ of habeas corpus.

Section 3 of the Immigration Act begins by excluding certain classes of physically and mentally undesirable persons, such as idiots, imbeciles, feeble minded persons, epileptics, etc., and then provides that persons not comprehended within any of those excluded classes, and who are found to be and are certified by the examining physician as being physically defective, such physical defect being of a nature which *may* affect the ability of the alien to earn a living, shall be excluded. It is apparent from a perusal of the pertinent parts of this section that Congress had in mind the exclusion of any alien who by reason of physical defects might at some future time become an undesirable citizen.

The fact that a former employer stated that the appellant's impairment of hearing would not in any wise interfere with him in earning a living "while in our employ", or that a friend offers to provide him with remunerative employment, is of no importance, as an offer of present employment may be procured for a man who has lost a leg, or both legs, or an arm, or both arms, or who is afflicted with any other physical defect, and yet, we

know of common knowledge that the loss or impairment of sight or hearing, or the loss of a leg or arm may and does affect an individual's ability to earn a living, and juries award damages daily based on that common knowledge.

The following excerpt from the decision in *United States v. Williams*, 190 Fed. 897, is pertinent and enlightening:

“As to the first of these propositions, the board had before it the certificate of the examining surgeons that Thomas Buccino was undersized and had ‘varicose veins of the left leg which affects his ability to earn a living.’ Moreover, the alien was present in person and they had opportunity during the examination which they conducted to form an opinion as to his physical and mental qualifications for earning a livelihood. Ever since the decision of the Supreme Court in *Nishimura Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146, it has, so far as I know, been held in this circuit that, if the board of inspectors had the alien before them so that they might themselves inspect and examine him, there was sufficient before them to warrant his exclusion on the ground that he was liable to become a public charge if in their discretion they reached such a conclusion. Nothing which has been presented on this argument persuades me to reverse this holding. It seems to me at least to be in strict conformity to

the rule enunciated in the Ekiu case and to the proposition enunciated in a host of other cases that the decisions of these boards are not to be set aside by the courts, because they think the weight of testimony does not support the board's conclusion. Speaking for myself, I may also say that, if I were a member of one of these boards of inspection, I should find the statements of relatives and friends that they would look after the new-comer far less persuasive than the enlightenment as to his qualifications to support himself which I might obtain from seeing and talking with him."

In *Wallis v. United States*, 273 Fed. 509, the District Court had permitted an alien to enter upon giving a bond for One Thousand Dollars, on condition that he would not become a public charge. On a review of this decision the Circuit Court of Appeals for the Second Circuit said:

"We know of no provision of law which warrants a release upon bond. If the appellees were entitled to enter the country, and therefore to their discharge, they were entitled to enter free from the condition of a bond. * * * There is a finding by the Board of Special Inquiry, which is approved by the Department of Labor, certifying to a physical condition of both of the relators, which may affect their ability to earn a livelihood. There is evidence to support this finding that the relators were likely to become pub-

lic charges. The court's jurisdiction, when the remedy of a writ of habeas corpus is invoked in immigration cases, is to inquire whether the ground of exclusion given by the administrative authorities is without any evidence to support it. Unless there is no evidence at all proving or tending to prove that an alien is within one of the excluded classes, the decision of the immigration authorities is conclusive upon the court, even though the evidence to the contrary be very strong. In *Low Wah Suey v. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, the court said: 'A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases, the order of the executive officers within the authority of the statute is final'."

Along the same line, Mr. Justice Holmes in *Chin Yow v. United States*, 208 U. S. 11, says:

"If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts

are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. * * * And by way of caution, we may add that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced."

In the same decision it is further said:

"But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

In *Wallis v. United States, ex rel Mannara*, 273 Fed. 509, the Court of Appeals for the Second Circuit, speaking through Judge Manton, says:

"Unless there is no evidence at all proving, or tending to prove, that an alien is within one of the excluded classes, the decision of the immigration authorities is conclusive upon the court, even though the evidence to the contrary be very strong."

An analysis of the cases relied on by the appellant will show that they, for the most part, sustain the appellee's position. The case principally relied upon is *United States ex rel Engel v. Tod*, 294 Fed.

820. This case is clearly distinguishable from the case under consideration in that the alien was denied admission as "a person likely to become a public charge", a provision of the statute entirely separate and distinct from that under consideration in this case, to-wit:

"Persons * * * who are found to be, and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living."

The court in the Engel cases stresses the fact that there were relatives who were willing to support the alien, so that regardless of whether or not he was able to earn a living, he was not likely to become a public charge.

"The alien's brother had been in the United States for 23 years. He was a naturalized citizen of the United States and was a manufacturer of children's dresses. He had \$8000 invested in his business and an income of \$100 a week. He owned a property worth \$60,000 in which his equity amounted to \$20,000. This property he described as a '16 family house' and the income from that house brought in \$10,000 a year. In addition he had, as administrator of his deceased wife's estate \$5665.

The alien also had an uncle, who was a manufacturer of dresses and a citizen of Brook-

lyn, and had been in the United States for 19 years. He testified that he had \$9000 invested in his business, and that he also had invited the alien to come to the United States. He was asked, 'What is he (the alien) to do here to maintain himself?' and he replied:

'We are to take care of him * * * We want at least the only part of our family here. That is all we have left of our entire family. We want to put the boy through a commercial course in college.'

The alien had come to the United States upon the invitation of his brother. The brother was asked, 'What can and will you do for them, (the alien and his son, who was 16 years of age) if admitted?' To this he replied, 'The son I will put in school, and my brother I will keep at the house.'

The cases cited on page 8 of appellant's brief, without exception, are cases where the question involved is, whether the alien was not likely to become a public charge, which as has been pointed out is an entirely different proposition from the possession of a physical defect which may affect the alien's ability to earn a living.

Thus in *Gegiow v. Uhl*, 239 U. S. 3, claimed by the appellant to be very much in point, the single question presented was whether an alien could be declared likely to become a public charge on the

ground that the labor market in the city of his destination was over-stocked, which clearly has nothing to do with the question of the existence of physical disability, which might affect the ability of the alien to earn a living.

In *Pazos v. Redfern*, 180 Fed. 500, the Court conceded that it would have had no jurisdiction if the Board of Special Inquiry had been properly constituted, as its decision would have been binding, and on the merits there was no question of any impairment of the alien's ability to earn a living, the court holding that her husband, already in this country, was earning sufficient to prevent the alien from becoming a public charge. The alien was referred to as strong, healthy and intelligent.

In *United States v. Martin*, 193, Fed. 795, the alien was free from mental or physical disability, followed the occupation of nursing, and had recovered a substantial judgment for damages against a party who had induced her to come to this country on a promise of marriage, subsequently broken. She had funds and friends, and the court held that "there was no indication whatever that she is likely to become a public charge." Observe that there was no question of mental or physical disability

which might impair the alien's ability to earn a living involved in this case.

Sprung v. Martin, 182 Fed. 230, involved three separate cases, but in each case the aliens sought to be deported were women and children supported by their respective husbands and fathers, and it was held there was no likelihood of their becoming public charges. No question of mental or physical disability which might impair the alien's ability to earn a living was involved.

In *United States v. Nakashima*, 160 Fed. 842, the only thing decided was that it was an infringement of an alien's right to deny him the right to appeal to the Secretary of Commerce and Labor from the decision of the Board of Special Inquiry excluding him. And in *United States v. Suekichi*, 199 Fed. 751, the court holds that the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, is not retroactive, and does not apply to certain offenses committed before the adoption of the amendment.

Nor does the final case cited by appellant, *Ex Parte Hosaye Sakaguchi*, 277 Fed. 913, give him aid or comfort, for here again, the question was not one of possible impairment of ability to earn a

living, but a question of the likelihood of the alien becoming a public charge; and the court says that if there was any evidence of mental or physical disability * * * he would have no hesitation in saying that the conclusion of the Board of Special Inquiry would be unassailable in any court. Judge Cushman, in his decision, stresses the fact that the alien in question has no mental or physical disability; and the further fact that if she is not able to earn a living, she has a well-to-do sister and brother-in-law domiciled in this country who stand *ready to receive* and assist her.

Summarizing, we find that not a single one of appellant's authorities is in point; that there is evidence in the record to warrant the conclusion of the Board of Special Inquiry that the appellant, Rokiya Tambara, has a physical defect which may affect his ability to earn a living, and which warrants the excluding decision based upon that finding; that there is evidence in the record which warrants the affirmation of the finding and decision of the Board of Special Inquiry by the Secretary of Labor; that there is nothing in the record to indicate that the appellant was not accorded a fair trial, and having had a fair trial, this court has no further jurisdiction in the matter.

Hence, we respectfully submit that the District Court properly denied the Writ and its decision should be affirmed.

THOS. P. REVELLE,
United States Attorney,
MATTHEW W. HILL,
Assistant United States Attorney.
Attorneys for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED VERDE COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOE JABER,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the District of Arizona.

FILED
NOV 10 1938
F. B. MALLORY

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED VERDE COPPER COMPANY, a Corporation,

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Names and Addresses of Attorneys of Record.

Messrs. ANDERSON, GALE & NILSSON, Prescott, Arizona,

Attorneys for Plaintiff in Error.

THOMAS P. WALTON, Esquire, Phoenix, Arizona,

Attorney for Defendant in Error.

In the District Court of the United States in and for the District of Arizona.

No. L. 128—PRESCOTT.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Demurrer and Answer.

Comes now the above-named defendant by its attorneys and not waiving any of its defenses hereinbefore interposed, for answer to the complaint on file herein demurs to said complaint upon the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That the same does not state facts sufficient to constitute a cause of action against this defendant under the Employer's Liability Act of the State of Arizona, under which act said complaint appears to have been filed.

III.

That said complaint does not set out facts that will support or authorize the recovery of compensatory damages for the alleged injury therein complained of.

IV.

That it affirmatively appears upon the face of said complaint that the injuries therein complained of did not result from any accident contemplated by the said Employer's [1*] Liability Act.

V.

That it affirmatively appears upon the face of said complaint that the injuries therein complained of were not sustained in and did not arise out of or in the course of the employment of the said plaintiff in the service of the defendant.

VI.

That it does not appear from said complaint that the said alleged injuries were not due to a condition or conditions of the employment or occupation of the said plaintiff.

VII.

That it appears from said complaint that the injuries complained of were not attributable to any

*Page-number appearing at foot of page of original certified Transcript of Record.

hazard or risk or any hazards or risks which were inherent in the occupation or employment of said plaintiff.

VIII.

That it does not appear from said complaint that the alleged accident and injuries resulting therefrom, if any such resulted, were due to the risk and hazard or risks or hazards which are inherent in a hazardous occupation as defined by said Employer's Liability Act and which were unavoidable by the said plaintiff while engaged in said hazardous occupation or employment within the terms and meaning of said Employer's Liability Act.

IX.

That it appears upon the face of said complaint that the injuries complained of were caused by the negligence of said plaintiff.

X.

That it appears from said complaint that the plaintiff has no right of action against the defendant for the injuries complained of. [2]

XI.

That it appears from said complaint that the accident complained of and the injuries resulting therefrom, if any such there were, were not due to an inherent risk or hazard of said plaintiff's employment but that the same resulted from conditions and causes that were well known to the said plaintiff and that he assumed the risk and hazard of injury therefrom.

XII.

That it appears from said complaint that the accident complained of and the injuries resulting therefrom, if any such there were, was not due to an inherent risk or hazard of the said plaintiff's employment but that the same resulted from conditions and causes that were well known to him and that he could have avoided the same and resultant injuries therefrom, if any such there were, by the exercise of that degree of care and caution required of him by the terms of said Employer's Liability Act.

XIII.

That it appears that said complaint does not state facts permitting the recovery under the terms and conditions of the Employer's Liability Act of Arizona or any Amendment thereof in this, to wit:

That it does not show that said injuries complained of, if any such there were, were due because of risks and hazards or a risk and hazard which are inherent in the hazardous occupation set forth in said Act and which are unavoidable by the workman therein and further that it fails to show that the injuries complained of were caused in the course of work at manual and mechanical labor or manual or mechanical labor in any of the employments or occupations enumerated in said Employer's [3] Liability Act by any accident arising out of and in the course of such labor, service and employment and due to a condition or conditions of such occupation or employment and further that it fails to show that the

said injuries complained of were not caused by the negligence of said plaintiff.

XIV.

That said complaint shows that said injuries complained of were not due solely to an accident arising in the course of the employment of the said plaintiff and said injuries were not due solely to the inherent conditions, risks and hazards of his said employment and occupation.

XV.

That said complaint shows that plaintiff is claiming damages far greater and different than the damages recoverable under the said Employer's Liability Act.

XVI

That it appears upon the face of said complaint that said action is based upon the Employer's Liability Act of the State of Arizona and that the said Employer's Liability Act is unconstitutional and void and in violation of Sections 5 and 7 of Article 18 of the Constitution of the State of Arizona in that it, upon its face, prevents the defenses of contributory negligence and assumption of risk from being submitted as questions of fact at all times to the jury and in that it deprived the defendant of the defense of contributory negligence and in that it attempts to deprive the defendant of the defense that the injured workman has assumed the risk.

WHEREFORE defendant prays judgment as to the sufficiency of said complaint and for its costs.

ANDERSON, GALE & NILSSON,

Attorneys for Defendant. [4]

ANSWER.

Comes now the defendant above named and not waiving any defenses hereinbefore interposed, for further answer to said complaint says:

I.

Denies each and every, all and singular the allegations of said complaint except such as are herein expressly admitted.

II.

Denies that by reason of any of the matters and things set out in plaintiff's said complaint that said plaintiff has been damaged in the sum alleged in said complaint or in any other sum whatever.

III.

Denies that plaintiff was engaged in manual and mechanical labor or manual or mechanical labor in any employment or occupation declared to be hazardous by the Employer's Liability Act of Arizona at the time he sustained the alleged injuries complained of.

Denies that such injuries, if any such there were, were due to an accident.

Denies that such injuries, if any such there were, arose out of or in the course of the labor and employment of the said plaintiff in any such hazardous occupation.

Denies that said injuries, if any, were due to a condition or conditions of the occupation or employment of plaintiff at the time he received such alleged injuries.

Denies that said injuries, if any, were due to any risk or hazard or risks or hazards inherent in the

occupation or employment in which the said plaintiff was then engaged. [5]

IV.

Defendant alleges the fact to be that the injuries sustained by plaintiff, if any such there were, were caused by the negligence, carelessness, fault and improper conduct of said plaintiff and would not have occurred but for his negligence, carelessness, fault and improper conduct and that the said plaintiff's carelessness, negligence, fault and improper conduct was the proximate and direct cause of his said injuries, if any such there were.

V.

Defendant alleges the facts to be that the injuries sustained by plaintiff, if any such there were, were caused by the violation by him of the orders, rules, regulations and instructions promulgated by the defendant for the safety of said plaintiff and his coemployees and for the protection of its property and he had full and complete knowledge and notice prior to his violation of the same of said orders, rules, regulations and instructions.

VI.

Defendant alleges that the accident resulting in the alleged injuries to plaintiff was not due to an inherent risk or hazard of his employment of occupation but that the same resulted from conditions and causes that were well known to him and that he assumed the risk and hazard of injury therefrom.

VII. .

Defendant denies that plaintiff is entitled to

recovery in its cause of action, any damages under and by virtue of the Arizona Employer's Liability Act or any Amendment thereof.

VIII.

Defendant denies that plaintiff has any right of action against the defendant for the alleged injuries complained [6] of. Defendant alleges that plaintiff has no right of action against the defendant for the alleged injuries complained of.

IX.

Defendant alleges that plaintiff in the course of work in any of the employments or occupations enumerated in said Employer's Liability Act received injuries by any accident arising out of and in the course of manual and mechanical or manual or mechanical labor, service and employment and due to a condition or conditions of such occupation or employment.

X.

Defendant denies that plaintiff, at the time of said injury so received by him, if any such there were, was in the exercise of due care and caution, but alleges the facts to be that said accident and resultant injuries, if any such there were, were caused by his negligence.

XI.

Defendant denies that plaintiff was injured by any inherent risk or hazard in his alleged occupation which was unavoidable by him.

XIII.

Defendant denies that plaintiff has suffered any pecuniary loss by reason of the matters and things

set forth in said complaint and denies that he has suffered any injuries that would sustain a verdict or judgment for compensatory damages or any damages against this defendant.

WHEREFORE defendant prays judgment that plaintiff take nothing by said complaint and for its costs.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: No. L. 128—Prct. Demurrer and Answer. Filed Nov. 10, 1922. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [7]

Regular April Term, 1923—At Phoenix.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of May 17, 1923.)

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Minutes of Court—May 17, 1923—Order Overruling
Demurrer, etc.**

The defendant's motion to make more definite and certain, motion to elect, motion to strike, and demurrer are now heard, and the Court being fully advised,—

IT IS ORDERED that the defendant's motion to make more definite and certain as to disability and sickness, etc., be and the same hereby is granted.

IT IS FURTHER ORDERED that the defendant's motion to elect herein be and the same hereby is denied.

IT IS FURTHER ORDERED that the motion to strike in Paragraph III of the Complaint, line 7 on page 2, the words "Without warning to this plaintiff," be and the same is hereby granted.

AND IT IS FURTHER ORDERED that the defendant's demurrer herein be and the same hereby is overruled. [8]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Amended Complaint.

Comes now the plaintiff and for amended complaint against the defendant says:

I.

That plaintiff is now and was during all of the times herein mentioned a resident of Yavapai County, Arizona, and defendant is now and was during all of the times herein mentioned a corporation owning property and engaged in the transaction of business and doing business in the County of Yavapai, Arizona.

II.

That defendant owns mines and mining properties, and operates said mines and mining properties in said County of Yavapai, State of Arizona, and that in the operation of said mines and mining properties the defendant has various and sundry underground workings for the mining development and extraction of ores from underground in its said mines and mining properties; and in the extraction and removal of said ores from said mines and mining properties defendant makes use of and uses dynamite powder and other high explosives for the breaking and pulverizing of ores and other substances in said mines; and that in the mining development, breaking and removal [9] of said ores from its mines and mining properties the defendant employs a large number of men for various and sundry duties and work in its said mines, underground and about its said workings.

III.

That heretofore, to wit, June 27, 1922, plaintiff was in the employ of defendant in defendant's said mine at and near Jerome, Yavapai County, Arizona, and was then and there working underground at the 1000-foot level in said mine, and was then and there employed and working as a mucker; and plaintiff was then and there, while in the employ of the defendant as aforesaid, working in the line of his employment and in pursuance of his duties, whereupon a heavy and violent blast of powder, dynamite or other explosive was set off in near proximity to this plaintiff, which blast was intense, loud, and carried great shock and violence, and as a result of said blast, shock, and the violence and intensity thereof, plaintiff suffered great physical pain and injury to the nerves in and about his left ear and head, and has continued and does now suffer great physical pain in and about said ear and head, and as a result of said injury and said shock caused as aforesaid the nerves in and about said left ear were injured and deadened so that plaintiff has lost the sense of hearing in said left ear, and by reason of said injuries resulting as aforesaid plaintiff has suffered great mental pain and anguish and will not recover, and said injuries, losses and disabilities are permanent in their nature. Plaintiff further alleges that by reason of said blast he suffered great nervous shock and his nerves and nervous system have been shattered, deranged and enfeebled, and from all of the aforesaid injuries, pain and suffering hereinbefore al-

leged and the losses resulting therefrom alleged, plaintiff has been damaged in the sum of \$10,000.00.
[10]

IV.

That the injuries herein set forth were caused by an accident, which accident was due to a condition or conditions of the occupation of plaintiff in the service of the defendant in a hazardous occupation, and was not due to the negligence of the plaintiff.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of ten thousand (\$10,000.00) dollars, and for costs.

THOMAS P. WALTON,
Attorney for Plaintiff.

[Endorsed]: No. L. 128 (Prescott). Amended Complaint. Filed May 19, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [11]

Regular March Term, 1923—At Prescott.

United States District Court in and for the District
of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of June 27th, 1923.)

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Minutes of Court—June 27, 1923—Order for Physical Examination of Plaintiff.

Thomas P. Walton, Esquire, is present on behalf of the plaintiff. LeRoy Anderson and Alfred H. Gale, Esquires, of Anderson, Gale & Nilsson, are present for the defendant.

The defendant, by its counsel, now makes request to the Court that a physical examination of the plaintiff in this case be made before trial.

IT IS THEREFORE ORDERED that Dr. Robert C. Buck be and he is hereby appointed to make physical examination of the plaintiff, Joe Jaber, at least one day before the trial of this case; and that both parties may be present at such examination.
[12]

Regular March Term, 1923—At Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of June 29th, 1923.)

L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court—June 29, 1923—Trial.

This case comes on regularly for trial this date.

The plaintiff, Joe Jaber, is present in open court and with his counsel Thomas P. Walton, Esquire. The defendant, United Verde Copper Company, a corporation, is represented by its counsel, Messrs. Anderson, Gale & Nilsson.

Both sides announce their readiness for trial, whereupon a jury of twelve men is duly empaneled according to law and the rules and practice of this court, and by the Clerk duly sworn to well and truly try the issues in this case.

Thomas P. Walton, plaintiff's counsel, now reads the plaintiff's complaint to the jury.

Counsel for the defendant reads defendant's answer to the jury.

WHEREUPON IT IS ORDERED that further trial of this case be continued until June 30th, 1923. [13]

Regular March Term, 1923—At Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of June 30th, 1923.)

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Minutes of Court—June 30, 1923—Trial (Con-
tinued).**

Pursuant to order of adjournment of June 29th, 1923, this case comes on now for further trial.

The plaintiff, Joe Jaber, is present in open court and with his counsel, Thomas P. Walton, Esquire. The defendant, United Verde Copper Company, a corporation, is present by its counsel, Messrs. Anderson, Gale & Nilsson.

All members of the jury are present in their respective places in the jury-box.

On request of the defendant, D. A. Little is sworn as court reporter in this case.

The plaintiff, Joe Jaber, to maintain his case, takes the stand as a witness in his own behalf, and being first duly sworn, is examined.

At the plaintiff's request, Mike Kronich is duly sworn as Syrian interpreter.

The deposition of Dr. F. E. Reese is now read in evidence by plaintiff's counsel, Thos. P. Walton, whereupon the said deposition is admitted and filed in evidence and marked Plaintiff's Exhibit One.

AND PLAINTIFF RESTS.

The defendant now moves the Court for a directed verdict, which motion is by the Court **DENIED.**
[14]

(Minute Entry of June 30th, 1923—Continued.)

The defendant, to maintain its case, calls W. B. DeCamp as a witness in its behalf, who being first duly sworn, is examined.

Defendant's Exhibit marked No. One for identification is offered in evidence and is admitted and filed as Defendant's Exhibit No. One, being a diagram.

Defendant's Exhibit marked No. Two for identification is offered in evidence and is admitted and filed as Defendant's Exhibit No. Two, being a diagram.

Henry Williams, being first duly sworn, is examined.

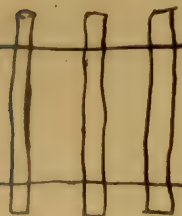
Dr. D. C. Carlson, being first duly sworn, is examined.

WHEREUPON IT IS ORDERED that further trial of this case be continued until 9:30 o'clock A. M. July 2d, 1923. [15]

Expendable light No. 1
marked for identification
Expendable light No. 2
submitted and dated June 30, 1937
at M. Hall, Alaska
Case No. 178. Prescott

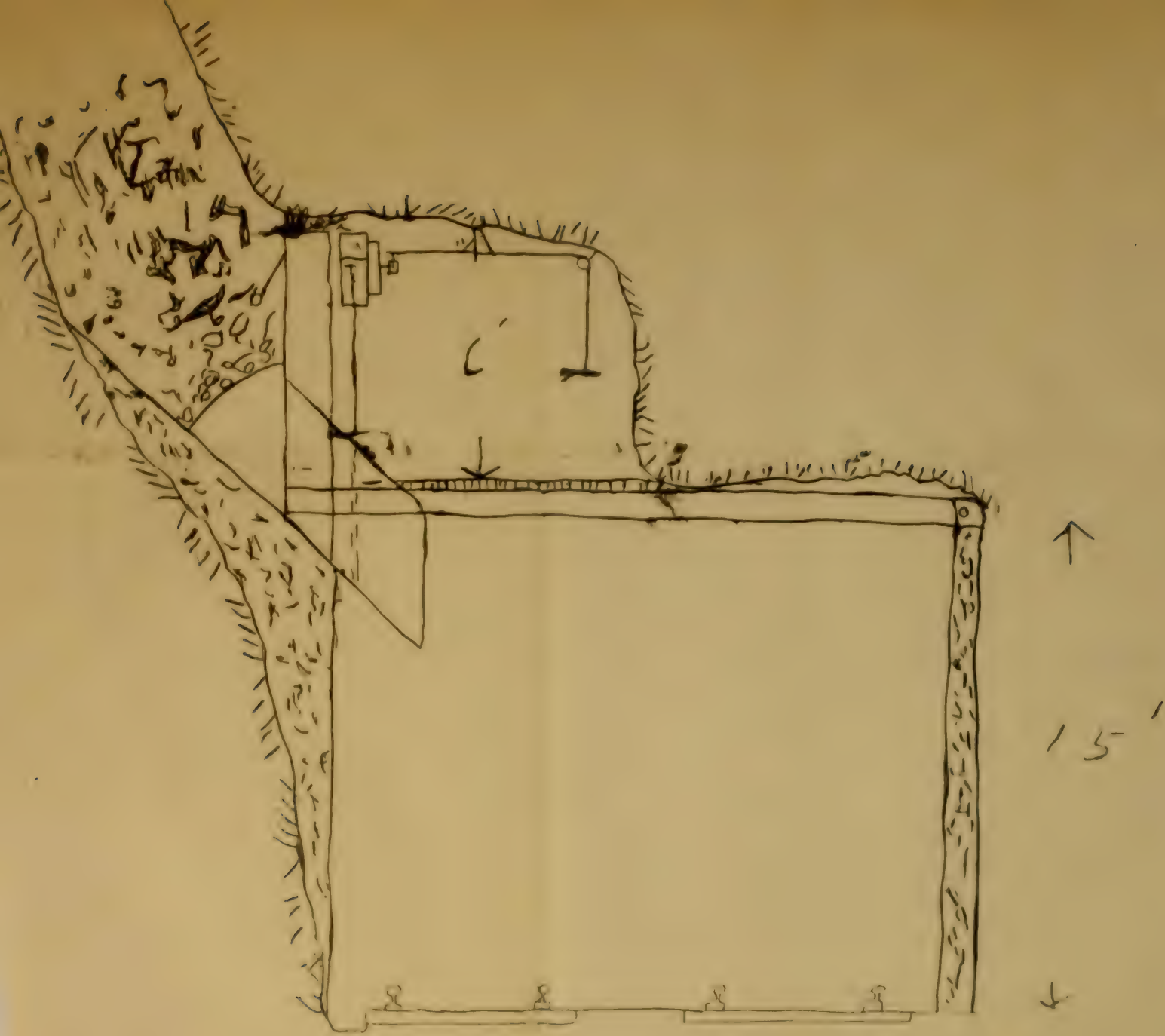
RAISE

RAISE



Plan Tunnel.

Supplement to Exhibit No. 2
marked for identification
Exhibit No. 2
Admitted and filed June 20, 1929
C.R. 110-111, 112, 113
Case No. 105-110-111-112-113



Regular March Term, 1923—At Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of July 2d, 1923.)

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Minutes of Court—July 2, 1923—Trial (Continued).

Further trial of this case is now had pursuant to order of continuance of June 30th, 1923.

The plaintiff, Joe Jaber, is present with his counsel Thos. P. Walton, Esquire. The defendant, United Verde Copper Company, is present by its attorneys Messrs. Anderson, Gale & Nilsson.

All members of the jury are present and in their respective places in the jury-box.

The defendant, to further maintain its issues in the case, calls Dr. C. R. K. Swetnam, as a witness, who, being first duly sworn, is examined. James Malcolm Walsch is called and, being first duly sworn, is examined.

Defendant's Exhibit No. Three is now admitted and filed in evidence, being the front side only of a hospital card of the United Verde Copper Company.

Dr. C. R. K. Swetnam is now recalled, and having been heretofore sworn, is further examined.

Defendant's Exhibit No. Four, a letter, is marked for identification only.

Dr. Robert C. Buck is called, and being first duly sworn, is examined. C. E. Young is sworn and examined. Robert F. Pate is sworn and examined.

WHEREUPON THE DEFENDANT RESTS.
[18]

(Minute Entry of July 2d, 1923—Continued).

L. 128—(PRESCOTT).

In rebuttal the plaintiff calls M. Fawhrez as a witness, who, being first duly sworn, is examined.

J. B. McNally is also called, and, being first duly sworn, is examined. W. B. DeCamp is recalled, and, having been heretofore sworn, is further examined. Mike Kronich is duly sworn and examined. Joe Jaber, plaintiff herein, is recalled, having been heretofore sworn, and is further examined.

BOTH SIDES REST.

WHEREUPON IT IS ORDERED that further trial be continued to 9:30 o'clock A. M. July 3d, 1923. [19]

Defendant's Exhibit No. 3.

UNITED VERDE COPPER COMPANY,
Hospital Department.

Form 240.

Name—JOS. JABER.

No. 365.

Working at MINE as MINER.

Date and nature of accident or sickness—6-26-22.

BACKACHE, DIZZY, COATED TONGUE.

Date and hour Hospital Dept. first notified—6-26
A. M.

Attended at Dispensary by Dr. WALSH.

Instructed to call—Daily.

Calls at Dispensary:

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Time	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	

In Hospital from ——— to ———.

Returned to work by Doctor ———.

Remarks — Off work.

6-28—albuminuria. Sent home to bed on milk diet.

(Stamped): Defendant's Exhibit No. 3. Admitted and filed July 2, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy. Case No. L. 128.
(THIS SIDE ONLY.) [20]

DEFENDANT'S EXHIBIT No. 3—Marked for Identification.

CALLS AT DISPENSARY:

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	

REMARKS:

7-20-22—Complains of deafness left ear which he said was caused by blast. This is first time he

has ever mentioned an injury. Examination of Drum shows there is no perforation. No serium plugs.

A. C. C. [21]

Defendant's Exhibit No. 4.

DEFENDANT'S EXHIBIT No. 4—Marked for Identification.

UNITED VERDE COPPER COMPANY.

In replying, Address
the Company.

Attention

MEDICAL DEPARTMENT.

Jerome, Arizona, August 2, 1922.

Dr. Swetnam,

Prescott, Arizona.

Dear Doctor:

We are sending you Mr. Joe Jaber for examination, for which the company will pay.

This boy came in for the first time on June 26. His complaint was dizziness. On the 28th we examined his urine and found abundant albumen. Few casts then but none now, but the albuminuria persists. We put him to bed on a milk diet in the hospital. He improved but in a day or two developed roaring and deafness in the left ear. I thot the symptoms were probably to localized nephritic oedema. They have persisted however and grown worse.

At the time of entrance he gave no history of injury. However after a few days he began to insist that his trouble started four days after he had

been near a small shot in the mine. We were not able to learn the certainty of this shot. Shooting of any consequence is not done on shift. There was no external evidence of injury to the drum that I could see. However, recently he has developed some redness around the upper margin of the drum. His blood Wasserman was negative.

Mental-nervous tests were negative except poor heel to toe walking, going down steps, slight, but distinct lateral nystagmus, quick to rt., and suggestion of von Graefe.

We do not see any reason to suspect injury as the cause of this illness. Will you please advise us by letter your findings in the matter, and call me by telephone as to what treatment he should have. If it is possible we prefer to have him come back here and we will carry out your orders.

Yours very truly,
JAMES THOM, M. D.,
Asst. Surg.

P. S.—If you think there is not reason to suspect injury as the cause of this sickness, he may go to Phoenix or anywhere he wishes. He has \$25 for stage fare and examination. If this will not be sufficient, inform me.—T. [22]

DEFENDANT'S EXHIBIT No. 4—Marked for
Identification.

C. R. K. SWETNAM, M. D.

Masonic Temple,
Prescott, Arizona.

Aug. 5, 1922.

Dr. James Thom,
U. V. Hospital,
Jerome, Arizona.

Dear Doctor:—

I have examined thoroughly Mr. Joe Jaber, whom you sent me on Aug. 3rd. I find absolutely no evidence of any injury or external violence to the ear or head. However, he has a definite neuritis of the 8th nerve, which on the left side amounts to practically complete loss of function for both the auditory and vestibular branches. On the right side there is a very slight affection which is shown only by reduction of bone conduction of sound. He seems to have some irritation along the base of the brain, judging by the symptoms of which he complains. This condition of the ears is certainly toxic, but I cannot say definitely from where it comes. He has some pus in the tonsils and he has some cough, which makes me suspicious of a chest condition, but it is possible for it all to be produced by the kidney condition.

His mental condition is not the best, and he feels positive in his own mind that all of his trouble started from the noise of the blast in the mine. I have told him that such was not the case, and that

absolutely all of his trouble comes from within. I have advised him to come back to you and ask you to take care of him, as it is going to take considerable time for the condition to clear up. The treatment is general care, rest and a searching for any point of infection. He also speaks somewhat of self destruction, should he not get [23]

C. R. K. SWETNAM, M. D.
Masonic Temple,
Prescott, Arizona.

Aug. 5, 1922.

better pretty soon.

He offered to pay me for *me for* his examination out of the \$25.00, but I told him to use that for board bill and stage fare, for I am afraid he is doomed to quite a long wait before being able to work again.

Hoping this examination will be of some benefit to you, and if I can be of further service, call on me.

Yours very truly,
C. R. K. SWETNAM.

CRKS:OH. [24]

Regular March Term, 1923—At Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of July 3d, 1923.)

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Minutes of Court—July 3, 1923—Trial (Con-
tinued).**

All parties and their respective counsel are present pursuant to order of continuance from July 2d, 1923, and all members of the jury being present in the jury-box, further trial is resumed.

The Court duly charges the jury, arguments are had by respective counsel to the jury, and the jury retires in charge of their bailiff, an officer of this court first duly sworn for that purpose, to consider of their verdict. Subsequently, at 9:20 P. M. after due deliberation, the jury returns into court in a body, all members being present, and report that they have agreed upon a verdict, and thereupon, through their foreman, present the following ver-

dict, Attorney Thos. P. Walton being present for the plaintiff, and A. H. Gale, Esq., being present for the defendant.

L. 128—(PRESCOTT).

“JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the Plaintiff, and assess his damages at \$1000.00 Dollars, One Thousand Dollars.

CHAS. P. SHERMAN,
Foreman.”

WHEREUPON the Jury is discharged. [25]

COPY.

L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

Against

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the Plaintiff, and assess his damages at \$1000.00 Dollars, One Thousand Dollars.

CHAS. P. SHERMAN,

Foreman.

[Endorsed]: No. L. 128—(Prescott). United States District Court, District of Arizona. Joe Jaber, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Verdict. Filed July 3, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [26]

In the District Court of the United States in and for the District of Arizona.

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Judgment.

Now on this 3d day of July, A. D. 1923, the above-entitled cause having come on for trial to a jury, the plaintiff and defendant having submitted their

testimony, respectively, to said jury, the Court having charged said jury upon the questions of law involved, and counsel having argued said case to the jury and the jury having retired to consider their verdict, and having returned a verdict for plaintiff in the sum of One Thousand Dollars (\$1,000.00);

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover of and from defendant the sum of One Thousand Dollars (\$1,000.00) and his costs incurred taxed and allowed at the sum of \$113.40.

Done in open court at Prescott, Arizona, on this, the 3d day of July, 1923.

F. C. JACOBS,

Judge of the United States District Court for the District of Arizona.

[Endorsed]: No. L. 128—(Prescott). Judgment. Filed July 7, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk.

Copy hereof received this 5th day of July, A. D. 1923.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant. [27]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Motion for New Trial.

Comes now the defendant above named and moves the Court for an order setting aside the verdict returned by the jury in the above-entitled cause and to grant to this defendant a new trial for the following causes materially affecting the substantial rights of this defendant.

I.

That the Court erred in overruling defendant's Demurrer to the complaint herein.

II.

That the Court erred in overruling defendant's motion for a directed verdict, made at the close of plaintiff's case and renewed at the close of all of the evidence.

III.

That the law, upon which said complaint and cause of action, is based, to wit: The Employer's Liability Law, of the State of Arizona, is unconstitutional and void, as being in violation of the

Fourteenth Amendment of the Constitution of the United States.

IV.

That the plaintiff failed to prove all of the material allegations of his complaint. [28]

V.

That the verdict is contrary to the law and the evidence.

VI.

That the evidence shows without conflict that the plaintiff was not injured while in the employ of the defendant, within the terms, conditions and provisions of the so-called "Employer's Liability Law" upon which this cause of action is based.

VII.

That the verdict is excessive.

VIII.

That the jury disregarded the instructions of the Court in arriving at its verdict, and that said verdict is not compensatory, as defined and set forth in the instructions of the Court.

IX.

Misconduct of the jury in arriving at their verdict.

X.

Error of the Court in refusing and admitting evidence.

XI.

Error of the Court in refusing instructions requested by defendant.

XII.

Error, particularly, of the Court, in refusing the following instruction requested by defendant:

“DEFENDANT’S REQUESTED INSTRUCTION
No. —.

The Court instructs the Jury that under the Employer’s Liability Law the Employer is liable to the Employee only when the injury is caused by an accident arising out of and in the course of the labor, services and employment of the employee and due to a condition or conditions of such occupation or employment and only when such injury shall not have been caused by the negligence of the employee injured. Such law does not cover ordinary sickness, even though such sickness was contracted during the course of the [29] employment; unless you can say that the accident caused the sickness, and if you believe from the evidence in this cause that the alleged concussion did not cause plaintiff’s injury, then he cannot recover even though you do find that he is suffering and has suffered from some disease.

I further charge you that even though you believe that the plaintiff was suffering from deafness or other trouble and that said deafness or other trouble was occasioned by disease and not by an injury received while in the employment of United Verde Copper Company, then he cannot recover. The law does not cover or contemplate payment for any disease and in this case the plaintiff claims to have been injured by an accident and that that accident caused his injury and the proof is not made

out by showing that he was suffering from some disease. You cannot and must not permit your sympathy for a man who has been sick nor diseased to give him damages or compensation, because under the law he is not entitled to it and all humanity must suffer the effects of certain diseases."

XIII.

That the damages assessed by the jury are excessive and contrary to the law and the evidence.

XIV.

Misconduct of counsel for the plaintiff, during the course of the trial and during his closing argument to the jury; that such conduct was of such a character and nature that the same could not have been corrected by objection from the defendant and admonition and instruction by the Court to the jury; that said misconduct consisted of statements, insinuations and direct personal remarks, concerning counsel for defendant, and the witnesses, and physicians, sworn on behalf of defendant, and not based upon the evidence in the case; that said insinuations, as to the physicians for the defendant, were that they were hired, employed and under the control of the defendant corporation; that there was no evidence to that effect in the record, and none upon which any such inference could be made or based.

WHEREFORE, defendant prays that the verdict, as returned in this case, be set aside, and that a new trial be granted herein.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: No. L. 128. Motion for New Trial.
Filed July 13, 1923. C. R. McFall, Clerk. [30]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corpo-
ration,

Defendant.

**Order Extending Time Sixty Days to Prepare and
Tender Bill of Exceptions.**

Upon the motion of the defendant herein and good
cause therefore being shown:

IT IS ORDERED that the defendant be and it is
hereby granted sixty days from this date in which
to prepare and tender its bill of exceptions in this
case.

Done in open court this 20th day of July, 1923.

F. C. JACOBS,
Judge.

[Endorsed]: L. 128—(Prescott). Order Extend-
ing Time to Prepare and Tender Bill of Exceptions.
Filed July 20, 1923. C. R. McFall, Clerk. By Paul
Dickason, Chief Deputy Clerk. [31]

In the District Court of the United States in and
for the District of Arizona.

L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Order Fixing Amount of Supersedeas and Cost
Bond.**

Upon motion of defendant herein that the
amount of the supersedeas and cost bond be fixed
herein,—

IT IS ORDERED that such supersedeas and cost
bond be fixed at the sum of Fifteen Hundred
(\$1500.00) Dollars and defendant be allowed thirty
days in which to file said bond.

IT IS FURTHER ORDERED that no execution
shall issue pending the filing of said supersedeas
and cost bond.

Done in open court this 20th day of July, 1923.

F. C. JACOBS,

Judge.

[Endorsed]: No. L. 128. Order Fixing Amount
of Supersedeas and Cost Bond. Filed July 20,
1923. C. R. McFall, Clerk. By Paul Dickason,
Chief Deputy Clerk. [32]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Supersedeas and Cost Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, the United Verde Copper Company,
a corporation, of the State of Delaware, as prin-
cipal, and the American Surety Company of
New York, a corporation of the State of New York,
as surety, are held and firmly bound unto Joe
Jaber in the sum of \$1,500, to be paid to said Joe
Jaber, for the payment of which well and truly to
be made we bind ourselves, our successors, or as-
signs, jointly and severally, by these presents.

SEALED with our seals this 9th day of August,
A. D. 1923.

WHEREAS lately at a session of the District Court
of the United States, for the District of Arizona, in
a suit pending in said Court wherein Joe Jaber
was plaintiff and the United Verde Copper Com-
pany was defendant, judgment was rendered
against said defendant, United Verde Cop-
per Company, and the said United Verde Cop-

per Company is prosecuting a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of the United States District Court as aforesaid.

NOW, THEREFORE, the condition of this obligation is such that if the above-named United Verde Copper Company shall prosecute said writ of error to effect, and answer all damages and [33] costs if it shall fail to make good its appeal, then this obligation shall be void; otherwise to be and remain in full force and effect.

UNITED VERDE COPPER COMPANY,

Principal.

By ROBERT E. TALLY,

Its General Manager.

AMERICAN SURETY COMPANY OF NEW
YORK,

Surety.

[Corporate Seal]

By GEORGE W. NILSSON,

Its Attorney in Fact.

Countersigned: FRED MOORE.

APPROVED by WM. H. SAWTELLE, Judge of the United States District Court, for the District of Arizona, this 25th day of August, 1923.

WM. H. SAWTELLE,

Judge.

[Endorsed]: No. L. 128. Supersedeas and Cost Bond. Filed Aug. 11, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [34]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Order Extending Time Thirty Days to File Bill of
Exceptions.**

Upon motion of the defendant herein, it appearing to the court that such extension of time is necessary, it is hereby ordered that the defendant shall have thirty (30) days from and after Sept. 18th, 1923, in addition to the extension already granted by this Court in which to perfect and tender its bill of exceptions herein.

F. C. JACOBS,

Judge.

[Endorsed]: No. L. 128. Order Extending Time.
Filed Sept. 10, 1923. C. R. McFall, Clerk. By
Paul Dickason, Chief Deputy Clerk. [35]

In the District Court of United States in and for
the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that heretofore, to wit,
on the 30th day of June, A. D. 1923, the above-en-
titled cause came on for trial at Prescott, Arizona,
upon the issues joined herein before the Hon. F. C.
Jacobs, United States District Judge for the Dis-
trict of Arizona, sitting in the City of Prescott,
Yavapai County, Arizona.

A jury was duly empaneled and sworn and there-
upon the parties respectively offered and intro-
duced the following evidence and exhibits of evi-
dence and offers of evidence and the following evi-
dence and offers of evidence were rejected and ob-
jections and motions were made and ruling of the
Court entered and exceptions duly taken by the
parties as follows, to wit:

APPEARANCES:

THOMAS P. WALTON, Esq., for the Plaintiff, and
Messrs. ANDERSON, GALE & NILSSON, for
the Defendant.

PLAINTIFF'S EVIDENCE IN CHIEF.

Page 2—Transcript of Evidence.

Testimony of Joe Jaber, on His Own Behalf.

JOE JABER, plaintiff, a witness on his own behalf, being duly sworn, testified as follows: [36]

My name is Joe Jaber, the plaintiff in this case. I was employed by the United Verde Copper Company at Jerome. About the 26th, 27th or 28th of June, 1922. I think I worked there about a month or thirty-two days. Before that I worked at Globe and at the Inspiration Mine at Miami.

Q. Did you ever happen to have any accident or injury before you worked for the United Verde Copper Company? A. Yes, sir.

Q. How is that?

A. No, sir. I have never been sick and don't remember being troubled with any disease. I am an Assyrian. I was working for the United Verde Copper Company on June 26th or 27th of last year. I had trouble with a blast while I was working on the 1000 foot level. I was working between the rail in the tunnel. The tunnel was probably 26 or 15 feet wide, I don't know exactly. I was working as a mucker, shoveling dirt and rock, cleaning the track so the motor train could pass. I was working with a fellow named William Shoemaker and an-

(Testimony of Joe Jaber.)

other fellow whose name was Joe Zanovich. I don't know where Joe Zanovich is now. I tried to locate him but I can't find him. These men were not close to me at the time of the accident. I can't tell exactly how far from me.

The blast went off. I had a headache and dizzy and ear drill. The blast was in the chute in the raise that is the hole that goes to the top. I was in the tunnel probably 35 or 40 feet from the raise when the blast went off. When the blast went off I had the headache and the ear drill and I fell down. I didn't hear anyone say that there was going [37] to be a blast. I fell down, become dizzy and it seemed to me that both ears drilled. By drill I mean a heavy noise in my ear. I was awfully sick when I fell down and dizzy when I stood up. I just sat down in that drift and called the two men. William Shoemaker come in, the other stayed outside. I said to Shoemaker, "Why didn't you say something if you want to blast? That shot hurt me." He said, "How did it hurt you?" I said, "Just an ear drill and headache." He said, "It must be that you got gas or something like that that make your head ache," and I said, "No, because I just felt it when you blast out of that chute." I told Mr. Shoemaker I could not do anything at the time and that I was going up. He said he didn't have time to go up with me then but would pretty soon. I went to a little office or station about 200 or 300 feet away where I washed my face and lay down on a bunk because I was dizzy and my

(Testimony of Joe Jaber.)

ear hurt and I had a heavy headache. I stayed there about an hour and a half and then I went up in the cage with the rest of the men and went in the cars that took us out to the change-room. I was still dizzy, had a headache and my ear was drilling. I went to the change-room and changed my clothes. I was not able to wash. I went down to the office in the same building to report I was hurt but I could find nobody there. After that I walked up to my room. It was about one o'clock at night when I got to my room. I couldn't sleep because my head ached and I was sick, my ear was drilling and I was dizzy.

Next morning I got up about nine o'clock and went up to see the doctor at the hospital. I saw Doctor Walsh. I told him all about it and he says, "Well, I see you are awfully dizzy all right and it must be that you ate something that poisoned you." I told him, "Doctor, no, I didn't think so [38] because when I feel it from the blast shot."

He got some medicine and said that maybe I ate something that poisoned my stomach or get some poisoned gas. Then he gave me some pills and said I would be all right.

He didn't put me in the hospital but told me I could go back to my room. I took two pills and then went back to work. I tried to work and I couldn't hardly work. I got sick again and dizzy and headache. Ear drill all the time. When I was underground I was worse sick. I saw I couldn't work so I call two fellows to call the cage for me

(Testimony of Joe Jaber.)

because I wanted to go back to my room. I didn't know who they were. They said they were new men on the work and didn't know how to call the cage. I then went to the office and laid down on the bench. I stayed down there until it was time to quit. Then I went up to the surface again and went back to my room. On the second day I went back to see the same doctor as before. I told him I was worse and he said he would examine me for kidney trouble. He took a sample of my urine. Then he said I had a little kidney trouble. I told him it came from the shot. He said, no it was a little kidney trouble. I told him it came from the shot. He said no, it was a little kidney trouble and he would give me some medicine for it. I told him I needed to stay in the hospital. He said, "No, you go back to your room, come back to-morrow and if you get any worse, I will put you in the hospital." I stayed in my room all that day and the next morning I came back and saw Doctor Tom. I told him all about the drilling in my ear. He took a look at my ear and said, "I see that the drum is red but it is not busted." He said for me to come back next day and he would take a picture of my head. The next day I came back and saw Doctor Tom again. He took a picture of my head and put me in [39] the hospital. I stayed there maybe fifteen or eighteen or twenty days. I asked him about the head picture and he said he couldn't see anything in the picture. While in the hospital I was dizzy, had a headache and the drilling in the

(Testimony of Joe Jaber.)

ear continued. He took a specimen of my urine again and said I had kidney trouble. I said it was not hurting me. He gave me some medicine and gave me some kind of drop in my ear at the same time. Every three or four days he took another specimen. Then he came and told me that my kidney is all right and everything. But I was just the same. My headache was a little better but I was dizzy and the noise in my ear. He told me that my kidney trouble was all well. He told me to go back to my room and he would come down and see me every day. Doctor Tom told me that Doctor Carlson told me to go home. I went back to my room because he made me. The doctor came down every other day down there. I told him I couldn't stand it and he said he would send me to Prescott. About three or four days afterwards, he sent me over to Prescott. He gave me \$25.00 and told me to go to Prescott to see Doctor Swetnam. I went to Prescott and saw Doctor Swetnam. He examined my ear with a wire. It made a little noise and I could hear in one ear and I couldn't hear in the other. He said he was going to see if I had any catarrh in my nose. He looked and said, "I never see any." Then he looked in my mouth and said, "I see some pus," and said probably there was some pus around my teeth. He put some medicine in my ear and after about five minutes he said, "That ear drum is busted. That is what I find." He said that the ear is busted and dead. I did not tell him anything about blast because the Doctor had

(Testimony of Joe Jaber.)

a letter from Doctor Tom. I told him about the blast after he asked me about it. [40]

I told him about the headache and the dizziness and the drilling that started in my ear immediately after the blast. He said that the ear nerve was busted. Drilling in my ear has continued since the time of the blast until now. The dizziness went away, just a noise continued. The dizziness lasted about four months. From the time of the blast I have not been able to hear in my left ear.

Cross-examination by Mr. ANDERSON.

Page 32—Transcript of Evidence.

Before going to Jerome, I worked at Globe and at the Inspiration in Miami. I have been a miner about a year. I was working with Mr. Shoemaker and another fellow named Joe Zanovich. The other fellow helped to load that train and sometimes he helped me when I needed it in mucking. This blast happened about the 26th, 27th, or 28th of June. I had been working in the mine about a month before that. I had not been working with Mr. Williams all of that time. Maybe ten or fifteen days. On the day that I was hurt, I was working on the 1,000 feet level with Mr. Williams loading muck into the cars. Mr. Williams was working at the chute. They were blasting in the raise to loosen the ore in the chute so it would run down. I don't know how much powder they used. I was not with him at the time. I was working down on the level. I am sure that Mr. Williams sitting there is the

(Testimony of Joe Jaber.)

man that was working with me. I hear everybody call him Shoemaker and that is what I call him. At the time the blast went off, I was down alongside the car putting muck into it. I was about thirty or thirty-five feet from the chute where the blast went off. I was hurt about 10:30 or 11:00 o'clock at night. I called Mr. Williams [41] or Mr. Shoemaker as I called him. I told him right away that I was hurt by the blast. I was feeling fine all the time up until then, no dizziness, no headache, no roaring in the ear before this time. The first day the doctor didn't examine me, just looked at my tongue and said I probably had eaten something that had poisoned my stomach and told me to take some medicine and go home. My stomach didn't feel badly but my head did and I felt sick. I went up to the United Verde Copper Company hospital next morning and saw Doctor Walsh. That morning he took a sample of my urine. He took my temperature and my pulse and looked at my eyes. He said he had no room at the hospital, for me to go home and come back next day. About the fourth or fifth day they put me in the hospital. When I was in the hospital he only give me milk to eat and put me to bed. He took specimens of my urine every five or six days. I can't tell how many days I was in the hospital the first time. Then they let me out of the hospital and told me to rest at my room. They didn't send me to Doctor Swetnam until about two months afterwards. I did not go to see the dentist at that time but later

(Testimony of Joe Jaber.)

on the hospital sent me to the dentist at Jerome. The dentist said my teeth were all right except they needed cleaning. He didn't say anything about the pus. Doctor Tom gave me \$25.00 and told me to go over to see Doctor Swetnam and told me he was a specialist on ear, nose and throat. Doctor Swetnam examined my head. Two or three days ago I was at Fort Whipple and was examined by Doctor Buck. Later on I came back to the United Verde hospital the second time. I can't tell just exactly how long I was there, six or seven weeks. They kept me on milk diet. When I was out of the hospital I had eaten anything I wanted to. The second time I was in the hospital [42] they did not test my urine. Doctor Snipes did not tell me that my teeth were loose and pus running from them. The dentist did not tell me that I had loose teeth, that the pus drained from them and wanted me to come back the next morning. My head does not ache and I am not dizzy now but my left ear drills. The other ear does not hurt at all. I have never had any teeth taken out since the time of the accident. After I saw Doctor Swetnam at Prescott, I returned to Jerome. After Doctor Swetnam had examined me, I went right back to the hospital at Jerome. I know Doctor Carlson was one of the doctors at the hospital but I didn't know whether he was the manager there or not. When I called for him, he came to see me.

(Testimony of Joe Jaber.)

Redirect Examination by Mr. WALTON.

Page 46—Transcript of Evidence.

I don't know how many times Doctor Carlson came to see me while I was in the hospital, maybe three or four times. I was put on a milk diet after I came back to the hospital again. When I left the hospital the first time Doctor Tom said I was well with kidney trouble. I was fighting with the Doctor every day because he made me awful hungry. Gave — three glasses of milk a day. I don't know how long they kept me on the milk diet. After two or three weeks, the Doctor said I could go to the table and eat whatever I wanted to. I lost a lot of weight.

There had been some other blasts before the one that made me fall down. Sometimes they blasted ten times, five times, six times. Sometimes they wouldn't need to blast at all. The other times when they blasted I would go down the tunnel a little way but then they would let me know. Someone [43] would say something so I could get away. At the time this blast went off, I was cleaning the muck out between the tracks. There was a car standing close to me. I cleaned muck off the ground between the tracks and put it in the car. I was standing between the chute and the car. I was standing between the two rails. I was probably thirty or thirty-five feet from the raise and about two feet maybe three or four from the car. I was working between two cars when the blast went off.

(Testimony of Joe Jaber.)

They put me on milk diet both times I was in the hospital.

Recross-examination by Mr. ANDERSON.

Page 53—Transcript of Evidence.

I eat what I wanted when I was out of the hospital. When I was in the hospital I didn't eat anything except milk.

Doctor Carlson came through the hospital every day. I finally left the hospital of my own accord because they put me on milk diet all the time and I am suffering just the same. I left because they did not treat me right there.

When I left the hospital I went right down to Phoenix.

When I entered the hospital I weighed 138 pounds. When I went to Phoenix I weighed 125 pounds. When I was in the hospital I weighed 117 pounds. Now I weigh 125 pounds or 126 pounds.

Redirect Examination by Mr. WALTON.

Page 57—Transcript of Evidence.

Before I left the hospital the doctor said he could do nothing for my ear but that my ear nerve would simply have to dry up by itself.

About ten days after the blast my neck was stiff. I couldn't twist it. [44]

Plaintiff's Exhibit No. 1.**Deposition of Doctor F. L. Reese, for Plaintiff.**

Page 58—Transcript of Evidence.

The deposition of DOCTOR F. L. REESE, a witness on behalf of the plaintiff was read. He testifies as follows:

Direct Examination by Mr. WALTON.

My name is Doctor F. L. Reese residing at Phoenix, Maricopa County, Arizona. I am a physician and a specialist of the eye, ear, nose and throat.

The qualifications of Doctor Reese were admitted by Mr. Gale for the defense.

I examined Joe Jaber, the first time on September 20, 1922. I was asked to examine his left ear. I examined it thoroughly. The object of finding was negative. By that I mean as far as I was able to see, there was nothing pathological. The drum of the ear was normal. I could not see the inner ear. There might be something wrong with the inner ear back of the drum and yet the drum would appear to be perfectly normal. The form of deafness in which there is no external findings is usually the result of shell shock, or an explosive, heavy explosion or concussion deafness in which there is an actual blow on the head. Any of these things may cause the same finding which is usually a hemorrhage in the inner ear leading to a form of nerve deafness. This would not cause any showing on the drum of the ear. There could be a deafening of the nerve brought about by a shock or blast.

(Deposition of Dr. F. L. Reese.)

The whole object of my examination was to determine to my own satisfaction whether or not the man was malingering. I would not make the statement whether he could hear or not but I came to the conclusion, judging from what I could find, that he [45] could not hear. Basing this simply upon the fact that I could not catch him by the tests which we ordinarily use in determining a malingerer. Sometimes it is easy to catch a malingerer but not always. A condition might be brought about in the inner ear from a heavy blast or shock which would produce deafness without a physical showing. Such a shock or blast might displace the bones of the inner ear. An injury such as I spoke of of the bones of the middle ear would interfere with the conduction of sounds to the nerves and would not be an injury to the nerve *per se*. I examined Mr. Jaber again about three days ago. The findings differed in no way from the first examination. I did not make any tests the last time to determine whether he was a malingerer or not. I found nothing to change the opinion which I formed at the first examination. Assuming that Mr. Jaber is deaf in his left ear from an injury such as I have described, there is no treatment which can relieve the condition. Usually there is no improvement of the hearing. Occasionally we have had a recurrence in later years of a slight amount of hearing, but in those cases it was always a question whether we had true concussion deafness or whether something else was the origin of it.

(Deposition of Dr. F. L. Reese.)

Cross-examination by Mr. GALE.

Page 65—Transcript of Evidence.

I have no ability to demonstrate that he had no hearing. The ear drum is subject to considerable variance but this ear drum could be classified in the line of normal. There were no perforations. There was no evidence of any traumatism or external blow upon the head or the ear or the drum. Deafness such as I have described could be the result of a toxic condition in the patient but of course we would have to take into consideration that he had an impairment in [46] only one ear. Such loss or impairment of hearing could be caused by nephritis. It could be caused by infected teeth or pus draining from the teeth. This is theoretical, however, as I have never seen a case of absolute deafness from such cause. It could be caused by scarlet fever. It is my opinion that the condition of his ear is due to concussion or possibly a condition that comes under the name of shell shock. If the blast caused the hemorrhage in the inner ear, deafness would result at the time of the injury or a comparatively short period thereafter. There could not be perfect hearing immediately after the injury and then this condition come on. If there was a hemorrhage, usually the destruction of the tissue results and we find that there isn't any great amount of recovery of nerve tissue. Any injury to an eighth nerve would occur at the time of the injury and not later. The deafness in this ear is nerve deafness. Nerve deafness may be caused by

(Deposition of Dr. F. L. Reese.)

a toxic condition. I cannot state whether there was any toxic condition in Mr. Jaber. I did not make any blood tests of him at all. I did not examine him except for the hearing in the left ear. His right ear looked normal and he did not complain of any impairment of hearing in the right ear. I could not state from my examination whether this man had nephritis. I looked in the man's throat just as routine as I always do and as there was nothing about his tonsils that caused me to stop to give them any particular consideration, I cannot say whether he had infected tonsils. I did not notice any pus about the teeth.

I am familiar with the general symptoms of nephritis. A condition of dizziness, etc., is one of the symptoms that goes with it. [47]

Redirect Examination by Mr. WALTON.

Page 71—Transcript of Evidence.

In my examination I did not observe any effect of nephritis. In case of loss of hearing due to infected teeth, it would be by the poisoning of the nerve tissues of the body with a special affinity for the nerve hearing. I did say that scarlet fever might cause loss of hearing. In such a case, however, it would come usually by infection of the middle ear which would leave unmistakable signs. Infected teeth or nephritis or general toxemia would not necessarily show any general findings in the ear. I said that this man might have had a hemorrhage of the inner ear. I found no evidence of a toxic

(Deposition of Dr. F. L. Reese.)

condition that I can recall. The toxic condition which would destroy the hearing would be liable to affect both ears.

Recross-examination by Mr. GALE.

Page 73—Transcript of Evidence.

I did not examine this man for nephritis nor did I pay much attention to any toxic condition. Such a condition might have existed and not come to my knowledge.

The deposition was then admitted as Plaintiff's Exhibit I.

Testimony of Joe Jaber, on His Own Behalf (Recalled).

JOE JABER, being recalled as a witness in his own behalf, testified as follows:

Redirect Examination by Mr. WALTON.

Page 74—Transcript of Evidence.

After I had been to Prescott to see Doctor Swetnam and returned to the hospital at Jerome, they took X-ray pictures of my head and my teeth and my chest and Doctor Tom took my neck picture. The doctor said he saw some kind of nerve in my neck. He said my ear looked like slip. I asked him what made my ear solid and he said probably from the nerve. [48] He said the teeth were all right, every one of them. He never said I had any pus around my teeth. He said my teeth were all right. He said my chest was all right.

(Testimony of Joe Jaber.)

Doctor Tom took a lot of blood and sent it off to have it tested. When it came back he said it was O. K. Mr. Farrag was present when he told me that. Nobody was present when he told me about the pictures. Mr. Farrag went with me the first time I went to the hospital. He came to see me sometimes every day. Sometimes every other day. The doctor at Prescott put medicine in my ear and spun me around on the stool a few times.

Mr. WALTON.—The plaintiff rests.

Page 77—Transcript of Evidence.

Whereupon the defendant, at the close of plaintiff's case, moved the Court for a directed verdict upon the following grounds:

“That there is no evidence proving or tending to prove any of the material allegations of the complaint; that there is no evidence tending to show that this action is within the terms and provisions of the so-called Arizona Employer's Liability Law; that there is a failure of proof to support the material allegations necessary to bring it within the terms of such a law in that there is no proof whatsoever of the relationship of master and servant or employer and employee and that the law under which this action is brought is unconstitutional, to wit, Paragraph 3159 of the same in that it undertakes to change the rule of the Constitution of the State of Arizona as to the question of contributory negligence and the assumption of risk,

(Testimony of Joe Jaber.)

being a question of fact to be submitted at all times as a defense to the jury.”

The motion of defendant was denied by the Court. Plaintiff's case was reopened.

Testimony of Joe Jaber, on His Own Behalf (Recalled).

JOE JABER, the plaintiff, was recalled as a witness on his own behalf.

Redirect Examination by Mr. WALTON.

Page 82—Transcript of Evidence.

I was paid \$4.00 a day for my work. I have not been able to work at all since I was injured. At the time I went to work for this company I was examined by Doctor Walsh. I [49] was undressed and they examined me all over. They examined my teeth, mouth, eyes, nose, chest, heart, liver, kidneys and all over. Ears and all over. My feet, legs, hands and he weighed me too. I weighed 138 pounds at that time. He did not say anything about any disease and gave me a slip to go to work and everything O. K. I have not worked in the mine since that time and I can never work in a mine any more because I am scared of it. I can't pass the doctor's examination any more for work.

Recross-examination by Mr. ANDERSON.

I have not tried to get any work since I was here. I worked a couple of days at Phoenix but couldn't stand it.

Mr. WALTON.—The plaintiff rests.

(Testimony of W. V. DeCamp.)

Thereupon the defendant renewed its motion for a directed verdict.

The motion of defendant was denied by the Court to which ruling of the Court, defendant, by counsel, then and there duly excepted. (Page 84 of the transcript.)

DEFENDANT'S EVIDENCE.

Page 84—Transcript of Evidence.

Testimony of W. V. DeCamp, for Defendant.

W. V. DeCAMP, a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

My name is W. V. DeCamp. I am a mining engineer employed as superintendent of the United Verde Copper Company at Jerome. I am familiar with the mine of the United Verde Copper Company and with the rules and regulations of that company. I have been connected with the company altogether five years but the last period of employment about three years [50] and two months. I am familiar with the 1,000 foot level and heard the testimony of Joe Jaber concerning it. I was employed in my present capacity at the mine on the 27th of June, 1922.

Thereupon a sketch was marked for identification, Exhibit 1 on the one side and Exhibit 2 on the other side, and the same was handed to Mr. DeCamp.

(Testimony of W. V. DeCamp.)

I made that sketch. It is an approximate plan of the tracks and the tunnel with the position of the raises and the 1,000 foot level. I am thoroughly familiar with it because I laid out this work in 1912 and had many occasions recently to relay rails and do other work in connection with it. Such work that my knowledge of the dimensions, etc., is exact because I am so familiar with this. It is a correct representation of the 1,000 foot level.

Questions on *Voir Dire* by Mr. WALTON.

This is a correct representation of the tunnel at the point where he was working near the No. 1 and No. 2 ore bins. This is the floor plan. The raises didn't come out as brought down by plaintiff's testimony. The tunnel is about 15 feet high and 22 feet wide. The ore chute begins to show about 15 feet above your head so the ore chute does not come down to the floor. It only comes to the top of the tunnel.

Direct Examination Continued by Mr. ANDERSON.

The other side of the sketch is a cross-section of the tunnel, being made through the tunnel and part of one of these raises, to show how the raises go up from the level.

Both sides of the paper, to wit, Exhibits 1 and 2, were thereupon offered in evidence.

Further questions on *Voir Dire* by Mr. WALTON.

I was in that tunnel on Monday morning of this week. I did not have this trial in mind when I was

(Testimony of W. V. DeCamp.)

in the tunnel. I [51] was going on my regular rounds in connection with my regular duties as Mine Superintendent. We have four chutes of that character on the 1,000 foot level. They are the termini of four raises which extend from the 1,000 foot level to the surface of the mine. They are constructed of steel and are the main transportation bins. They are all large capacity, holding about 1,100 to 1,200 tons apiece.

The place where this alleged accident occurred was close to No. 2 raise. The floor plan and the cross-section were made to give an idea of how this place looked.

Thereupon the two exhibits were admitted in evidence as Exhibits 1 and 2, page 90 of transcript.

The tunnel at that point is exactly 22 feet wide. Between the face of the concrete under the raise 23 to 24 to the opposite side. There is a set of double standard gauge tracks in front of each of these batteries of two raises. The tunnel narrows down then for a short distance and when you come to the next two raises, it widens to 22 feet. The elevation will vary between 9 and 15 feet. A minimum of 9 feet is necessary in order to get our trolleys up to a point where they are safe. The elevation is identical for all four raises in the mine. They were designed at the same time and the construction and steel work were all made at the same time and the ground was cut and they were installed at the same time.

(Testimony of W. V. DeCamp.)

The tunnel at the raise is actually 15 feet to the ceiling. The total length of the tunnel is a fraction over a mile and a half. I am familiar with the work Jaber was doing. He would be working on the floor of the tunnel loading into a car which they will spot occasionally at this point. The elevation at the point of the bins is 15 feet to the ceiling; [52] 12 feet to the bottom of the chute. There is an air controlled gate at the mouth of the chute to control the ore so that the cars did not become overloaded. Ore is loaded in the cars and they are taken out to the crushing plant at the mouth of the tunnel. There are 10 cars to a train and motormen are going back and forth in the tunnel all day.

This man's job was to clean up the spillage of ore resulting from the loading of the cars. When the ore is loaded from the chutes into the cars, some of it gets over the sides on to the track and to prevent derailment we keep one man on that job. It is a light job. Sometimes it is necessary to blast in the chutes because large rocks may arch at the point of discharge or the ore may be moist and so clog up the chute. If the ore cannot be started by barring it loose, it may become necessary to place a stick of powder up in the raise close to the rock that is lodged therein. Blasting may occur several times during a shift or it may not occur for a week. There is never any blasting in the tunnel. It is confined entirely to the raise.

This tunnel is wired for electricity a little better than the average building. All our wires are in

(Testimony of W. V. DeCamp.)

conduits on account of moisture. We use the ordinary lights. The blasting is never violent enough to destroy or jar the electric lights in the neighborhood of the raise.

In the event of an accident, the individual reports to the shift boss or some other boss, usually the shift boss or if the individual is so badly injured that he cannot report, the nearest man makes the report to the shift boss. This is the rule of the company which rule is posted about the mine. When the shift boss comes to the surface, he fills out a card especially prepared for the purpose with the name of the man, [53] his number and the nature and manner in which the accident occurred. This is left in the office of our Safety First Engineer. As soon as the Safety First Engineer comes to work, he looks over the cards placed in his office during the night and further investigates the particular case. Our records show that no record was made of an accident such as complained of here.

United Verde Copper Company maintains a hospital equipped with all modern equipment and in June of 1922, Doctor A. C. Carlson was Chief Surgeon; Doctor Walsh and Doctor Tom were his assistants and Doctor Rogers was an X-ray technician.

Cross-examination by Mr. WALTON.

Page 106—Transcript of Evidence.

The chute is like a trough, has a bottom and two sides but is not covered at the top and there is a

(Testimony of W. V. DeCamp.)

closed gate at the end. The gate would be closed when we are blasting. After leaving the vicinity of the raise, the ceiling of the tunnel slopes down to approximately 9 feet and then comes up to 15 feet against the next raise. If a man was 30 or 35 feet from the raise, he would be where the tunnel would be only about 9 feet in height.

If a blast is set off in the chute, it would travel in both directions from the raise but it would not become more dense because the vibration is going both ways as it left the central point. Therefore the velocity of sound or travel of the air movement or wave movement would be very much lighter than it was up in this little hole where the blast occurred.

I have stood alongside of these chutes, did not even go down when I blasted two sticks of powder in this chute simply because I knew the powder was confined in the steel box and I knew that if I stood 10 or 15 feet away that was enough for me and I saved the time necessary to climb 15 feet [54] of ladder and go down. I have actually done that myself. I have worked with powder all my life and I believe I have a very fair knowledge of the effects of it.

We do not haul the ore out on the same cage as the passengers. We do haul material and supplies down on said cage. The cage is moving up and down practically all of the time during the shift by the bosses traveling back and forth and by men with material, supplies, drill steel, etc. I have very seldom seen a cage standing still.

(Testimony of W. V. DeCamp.)

Redirect Examination by Mr. ANDERSON.

Page 119—Transcript of Evidence.

There would be no appreciable concussion with a man standing 35 feet from the raise on the floor of the tunnel or level. I would say there would be no jar at all, 25 or 30 feet away from the raise. I have been closer than that and have never had any ill effects. There might possibly be a ringing in the ears for a short time after the blast but no serious effects.

Recross-examination by Mr. WALTON.

Page 119—Transcript of Evidence.

I have had a ringing in the ears for a short time after a blast. The effect on the individual would depend on the extent of the explosion.

Testimony of Andrew Williams, for Defendant.

Page 127—Transcript of Evidence.

ANDREW WILLIAMS, a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

My name is Andrew Williams. I reside at Jerome, Arizona, where I work for the United Verde Copper Company. I was working for the United Verde Copper Company in June of 1922. I had worked there about a year and a half before that time. I know the plaintiff, Joe Jaber. I am the man sometimes called Shoemaker. Jaber worked with me in June, 1922, at the 1,000 [55] level. He worked with me about a week loading trains.

(Testimony of Andrew Williams.)

At that time I was loading trains in the chutes. Jaber never told me about being injured by a blast. I usually set off the blasts myself. We would use perhaps a quarter of a stick or half a stick. He usually helped me until I was ready to spit the fuse, then I turned on the air and hollered "fire" so that if anybody was around close, he would have a chance to get away on the side. I would be right close to the cars—15 or 20 or 30 feet from the chute; sometimes more and sometimes less.

Jaber never told me he was blasted. He did tell me he was sick. While he was mucking in 1 and 2, he told me he was dizzy. I told him to go to the hospital or to go to the druggist to get something. He never said anything about being blasted. I did not see him again until three weeks or a month later when I saw him on the street. Then he said, "Do you remember the time I was blasted right in my ears?" I know of no time when he was blasted. I later saw him in the hospital. I never took this man to the station at any time while he was working there either because he was injured or sick. The week that Jaber was working there, there was also a motorman working at the 1,000 feet level. His name was Bob Pate. He is still working for the United Verde.

Cross-examination by Mr. WALTON.

Page 134—Transcript of Evidence.

My name is Andrew Williams not William Shoemaker. I have lived at Jerome about eight years.

(Testimony of Andrew Williams.)

I am part German and part Polish. I never told Doctor Tom anything. He called me to his office and asked me about this blast but I made no report to him. I don't remember that Jaber ever called to me and asked why I set the blast off without letting him know. I never did laugh at him nor did I say I did not think it would hurt him. [56] I am sure of that. I am sure I never made the report to Doctor Tom about Jaber being blasted. Later I met Jaber on the street and asked him what was the matter. He asked me about the blast and I laughed and said I did not know. I thought he was just kidding me or something like that. I did not laugh at him down in the mine. I did not tell him to go to the little station with me nor did I tell him to wash his face. I didn't know anything about him lying on a bench in the station until the shift went off. I don't know if he was sick at that time or not. All that he ever told me was that he was dizzy. I don't remember any other incident. He told me he was dizzy a few days after he started to work with me. He told me he was dizzy while I was standing there waiting for the other train to load. I did not put my hands over my ears when a blast went off. The blast is not ever heavy enough down there to think about it. I have been in this country since 1907. I am a citizen, 32 years old.

(Question by Mr. ANDERSON.)

I am an ex-service man and served in the United States Army.

Testimony of Doctor A. C. Carlson, for Defendant.

Page 138—Transcript of Evidence.

Doctor CARLSON, a witness on behalf of defendant, being duly sworn, testifies as follows:

My name is A. C. Carlson. I am a physician and surgeon living at Jerome, Arizona. I am chief surgeon of the United Verde Copper Company hospital at Jerome, Arizona. I am a graduate physician and surgeon, licensed to practice in Arizona. I have had experience with the Los Angeles County Hospital, Rockefeller Institute in New York, post-graduate work at the Post Graduate Hospital at New York and the present hospital. [57] I have been with the United Verde Copper Company hospital for more than ten years.

I do not recall when I first saw the plaintiff in this case but he was admitted to the hospital on July 1, 1923.

I examined the plaintiff's urine when he was admitted to the hospital and found he had chronic nephritis. This is an involvement of the kidneys. It is ordinarily called Bright's disease. The symptoms which this man had which I associated with Bright's disease was dizziness. The analysis I made of the urine, which is done by heating acetic acid, centrifuging the urine and examination under the microscope. This analysis showed presence of albumin and presence of casts under the microscopic examination and epithelial cells. The man looked sick. He was sick and in need of care

(Testimony of Dr. A. C. Carlson.)

which we gave him. When this man came to the hospital, he was suffering from backache and dizziness and due to the urinary examination, which proved he had Bright's disease, we treated him for Bright's disease at that time. He did not complain of a blast at the time he was admitted to the hospital. The first time that I knew that he complained of a blast was when it was brought to my attention by one of the other doctors on July 20th (?). I made a record of it at that time. He complained that he was deaf in his left ear from a blast. He was admitted on July 1st and left of his own accord July 12th. Later he came back to the hospital again. When he first came to the hospital, he was placed in bed for a rest and given a milk diet. After he reported his deafness in his left ear, I personally looked into the ear to see if there was anything in the canal. Not seeing anything and not being an ear specialist, I asked Doctor Tom to send him to Doctor Swetnam as I was leaving the city for a few days. He was referred to Doctor Swetnam who is an ear, [58] nose and throat specialist at Prescott. I received a report from Doctor Swetnam of his examination. Mr. Jaber was readmitted to the hospital on August 7th. So far as the condition of his urine, it was the same when he came back the second time. His general condition was apparently the same. I could see no improvement. He was still suffering from Bright's disease and his complaint of deafness in the left ear for which we had sent him to Doctor Swetnam.

(Testimony of Dr. A. C. Carlson.)

He left again of his own accord on September 8th. In the meantime, the treatment we gave him was rest in bed and milk diet which is the standard treatment for nephritis. He came to my office again on the 18th day of September when I saw him. Mr. Jaber resented the milk diet and stated he was ready to do anything I told him to do. I sent him to Doctor Snipes who is a dentist in Jerome. Joe then got up and said goodbye and said he was going to Phoenix because we did not know what we were talking about. His condition then was about the same as when he was first admitted to the hospital. It is my opinion that the cause of his illness and condition was Bright's disease. Dizziness and tenitis or ringing in the ears are characteristic symptoms of Bright's disease. It is my opinion that this dizziness and ringing was due to Bright's disease or from the same focus of infection that originally caused his Bright's disease. While he was in the hospital I saw the plaintiff every day as I made daily rounds at every ward and room in the hospital twice a day. He complained about the restricted diet of milk. Plaintiff was permitted to have all the milk he wanted. He was restricted to milk diet so as to put the least amount of work on the kidneys in trying to improve the condition of the kidneys. On the recommendation of Doctor Swetnam, we X-rayed the sinuses of his head and his chest. I have taken X-ray [59] pictures and read them for several years. You can see soft tissues in X-ray but not to tell whether there is a disease of a nerve from an

(Testimony of Dr. A. C. Carlson.)

X-ray picture. We took these X-rays to ascertain if there was any focus of infection or abscesses in his sinuses or a pulmonary condition. He did not return to the dentist for treatment. I have not seen him since the 11th of September until to-day. That is my recollection. He left the hospital voluntarily both times and was not discharged as cured of this disease. We were ready and willing at all times to continue to treat him and did everything we could for him. If this man's ear had been injured by a blast, it is my opinion that he would have had some evidence of it at the time of the accident. At the time of the blast and not long afterwards. A blast would not cause a condition such as we found without some external evidence of injury. Bright's disease may be caused by numerous conditions such as scarlet fever, diphtheria, typhoid fever and severe case of pneumonia, infected tonsils or infected teeth. As a rule, Bright's disease always has another primary focus. There are very few kidney conditions that are primary. It takes some time to develop Bright's disease. It does not develop in three or four days after a blast.

At the time he left the hospital to go to Phoenix, he said that the doctors at the hospital and the dentist did not know what they were talking about. His trouble was due to a blast.

Cross-examination by Mr. WALTON.

Page 154—Transcript of Evidence.

While I am not an ear specialist, if there was a

(Testimony of Dr. A. C. Carlson.)

severe trauma from a blast, he would have some external evidence of it.

Jaber complained of dizziness and ringing in the ear from [60] the beginning. Ringing in the ear is a tenitis. Tenitis is a ringing in the ears and that is due to high blood pressure, secondary to nephritis. I don't know anything about the different forms of tenitis but when I find tenitis as a symptom and I have my urinary findings of albumin and casts, I do know that the man has nephritis. The symptoms of shell shock vary so greatly that one patient might have tenitis as a symptom and another might not. Plaintiff was admitted as a sick patient because he came and asked to be admitted to the hospital. If a man suffered a blast, the rupture or hemorrhage in the inner ear, he would undoubtedly experience extreme dizziness, deafness on that side and would possibly be nauseated due to the pressure of blood in the inner ear. Tenitis would be along with the other symptoms. When Joe came to the hospital he complained of backache, dizziness and his ear. We looked to his urinary findings to find out what was causing his backache, dizziness and the extreme heavy-coated tongue. He was in the hospital twelve days and saw me every day but he never mentioned the blast during those twelve days. He mentioned the blast on the 20th day of July. According to our records he went to see Doctor Swetnam in Prescott on August 3d. We never told him that we had cured his kidney trouble. Plaintiff was readmitted to

(Testimony of Dr. C. R. K. Swetnam.)

the hospital on August 7th after he returned from Doctor Swetnam and was put to bed on the same treatment.

Testimony of Doctor C. R. K. Swetnam, for Defendant.

Doctor C. R. K. SWETNAM, a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. ANDERSON.

Page 162—Transcript of Evidence. [61]

My name is C. R. K. Swetnam. I am a physician practicing at Prescott, Arizona. I specialize in ear, nose and throat. I am qualified to practice in the state and have been such since January of 1906. I practiced in general medicine in a hospital in Washington, D. C., for a year and a half. In Arizona in general practice until 1912. In Vienna, Austria, for a year and a half following that and then in the city of Los Angeles in private practice and hospital work and then back to Arizona for the last two years or nearly so. I have been specializing in one line of work for nearly eleven years.

I know the plaintiff Joe Jaber. He was referred to me as a patient last August by Doctor Tom who was connected with the United Verde Copper Company hospital at Jerome.

I made an examination at that time of his ears, nose and throat. I found Mr. Jaber was suffering from neuritis or degeneration of the eighth nerve

(Testimony of Dr. C. R. K. Swetnam.)

in the left ear and slightly so in the right. There was no evidence of any injury or external violence to the ear or head. I found pus in the tonsils and pus around some of the teeth and came to the conclusion that the condition of the nerve was a toxic or poisoning condition. Toxic means poisoning simply but in a condition of that kind we try to divide it because it might be an infection that is secondary in the nerve or it might be a simple irritation of the nerve by poisons. This poison could come from pus, from breaks or from any other cause such as tobacco, whiskey or any of the things might *might* cause a toxic condition of that nerve. Pus in any place from the crown of the head to the sole of the feet could have the same effect. I secured the history of the case mainly from Mr. Jaber himself. I made no examination of the condition of Mr. Jaber's kidneys but did receive that information from the [62] United Verde hospital doctors.

Doctor Swetnam was then excused so that he might go to his office to try to find a letter which Doctor Tom gave to Mr. Jaber to give to Doctor Swetnam at the time that he was sent there for an examination.

Testimony of Doctor James Malcolm Walsh for Defendant.

Page 168—Transcript of Evidence.

Doctor JAMES MALCOLM WALSH, a witness on behalf of defendant, being duly sworn testified as follows:

Direct Examination by Mr. ANDERSON.

Page 168—Transcript of Evidence.

My name is James Malcolm Walsh. I am a physician at the United Verde Copper Company hospital in Jerome, Arizona. I have been in that position for about five years. I am a licensed physician and surgeon of the State of Arizona. I have been practicing medicine for five years. I have taken a few post graduate courses. I have had two or three years of hospital work and I think that is all. I am a graduate of the University of Michigan. I was connected with the United Verde Copper Company hospital in June, 1922. I am acquainted with the plaintiff. I think I saw him the first time in May, 1922. I examined him when he was going to work for our company. In making the examination, we had him take off his clothes and looked over the surface of his body for any signs of accident or injury. We examined his eyes, as to distance vision. We examined his ears as to the spoken voice. We examined his heart and his lungs, took his height, weight, age, name and whether married or single. We made no specific examination of his hearing. Neither did we make

(Testimony of Dr. James Malcolm Walsh.)

an examination of his kidneys or the functions of the organs of his body. The only purpose of our examination was to see if there was any external evidence of injury. The next time I [63] saw him was on June 26, 1922, when he came into the hospital complaining of sickness. The record card was made of that event (the card was handed to the witness). This is a record of Mr. Joe Jaber when he came into the hospital for the treatment of sickness on June 26, 1922. It is a record of the first three days.

The card was marked Defendant's Exhibit 3 and offered in evidence.

(Questions on *Voir Dire* by Mr. WALTON.)

I did not make all of the record. I made all on the front side. I did not make the other side. We put down the most important things that he told us. The other side of the card was prepared by Doctor Carlson at a later time. The face of the card was admitted as Exhibit 3. The reverse having been made by Doctor Carlson was excluded.

Examination Continued by Mr. ANDERSON.

If a man reports an accident, very careful record is made of it on a special card for accidents which are kept separate and distinct from other record cards. This card is a record for sickness which I made of this man. When the plaintiff came in he told me he was dizzy. I looked at him but not at his ear. His tongue was heavily coated. I gave him medicine and sent him home just as he testified

(Testimony of Dr. James Malcolm Walsh.)

on the witness-stand. At that time he made no report concerning an accident. He did not say he had been blasted or hurt in the mine in any way. I saw him again the next day and the third day. I took a specimen of his urine just as he stated and made an examination of it. I did this because his dizziness did not clear up with the simple purgative and after I made an examination of the specimen, I had no occasion to go any further. I found albuminaria and knew immediately that he [64] was suffering from kidney disease. I told him that he was suffering from kidney disease and to go home and go to bed and take nothing but milk and water. At that time he told me absolutely nothing about a blast or injury. The technical name for the disease of the kidney is nephritis, Bright's disease. I don't remember Jaber ever telling me about an injury. I saw him many times afterwards but I was not taking care of him any further. The standard treatment for the disease from which this man was suffering is rest in bed and a diet of milk and water. I do not remember the date he was admitted to the hospital but recall that he came there with his friend and asked that he be admitted because they could not take care of him at home. He was admitted. Dizziness and ringing in the ear are symptoms of nephritis and may affect the hearing. I did not notice any evidence of an injury to the head or ear because he did not mention it and I did not look for it.

(Testimony of Dr. James Malcolm Walsh.)

Cross-examination by Mr. WALTON.

Page 180—Transcript of Evidence.

I never heard of any difference or division of tenitis into simple and compound.

When Jaber came to the hospital, he looked to me like a sick man and he told me he was dizzy. He did not complain of his ear and he did not report any accident. I do not try to discourage or keep out the records of these accidents. I am a practicing physician. I am employed to practice medicine, not to keep down the record of accidents. In nephritis, the cause of the trouble in the ear is toxin from the disease. It is caused by high blood pressure by the result of the toxin. If a man was injured in the ear from a blast, dizziness would be one of the first symptoms. Probably sickness at the stomach and vomiting. Tenitis would probably immediately set up. [65] In nephritis the attack may be on either one or both ears because you might have only one nerve affected. If Jaber had mentioned a blast to me, I would have associated his symptoms with the blast except the coated tongue. Of course that would not come from a blast. I would not expect a coated tongue from a blast. While it is possible that a hemorrhage of the eighth cranial nerve might have caused his ear trouble, I would have expected the symptoms to be a little more pronounced in case of the hemorrhage.

Redirect Examination by Mr. ANDERSON.

Page 189—Transcript of Evidence.

If a man was blasted, he might have dizziness

(Testimony of Dr. C. R. K. Swetnam.)

and nausea but he would not have pus around his teeth or in his tonsils nor would it cause the kidney trouble which we found.

Doctor C. R. K. Swetnam, for Defendant (Recalled—Redirect Examination.)

Redirect Examination by Mr. ANDERSON (Continued).

Page 191—Transcript of Evidence.

I have found the original of the letter I received from the United Verde hospital.

His letter was then marked Defendant's Exhibit 4 for identification.

Doctor Swetnam then identified a letter dated August 5, 1922, written by him to Doctor Tom of the United Verde hospital after examining Mr. Jaber and in reply to the letter marked Exhibit 4.

The objection of counsel for plaintiff to Exhibit 4 (letter from the United Verde hospital to Doctor Swetnam and to the letter written by Doctor Swetnam to Doctor Tom) was sustained and defendant asked for and was allowed an exception to such ruling (page 194 of Transcript of Evidence).

It was my opinion, after examining the patient that his condition was caused entirely by a toxic condition. There [66] was absolutely no evidence of external violence to the ear or the head. I told the patient that his condition was a disease of the ear caused by some kind of poisoning. I told him that the blast had nothing to do with him. I referred him back to the hospital for general treatment and to try to eliminate *or* sources of poison.

(Testimony of Dr. C. R. K. Swetnam.)

I told the doctor at the United Verde hospital to search for all evidence of poisoning. In my opinion the proper treatment in this case was to remove the source of poison that might cause the trouble in the ear. Rest and time would be the only sure treatment. I did not examine Mr. Jaber below the throat.

I told the patient what I thought was wrong with him and sent him back to Jerome.

Cross-examination by Mr. WALTON.

Page 199—Transcript of Evidence.

The plaintiff had a neuritis which was caused by the toxic condition. The evidence was pus in his tonsils and around some of his teeth. Those teeth were loose. I do not know whether they would tighten again. I don't know what makes a tooth loose from pus. I just remember that he had pus around those teeth and I was interested to get rid of the pus to cure his ear.

Jaber told me about a noise from a shot—he said a little shot.

Even though he told me that he was subjected to a loud noise from a blast and had had no trouble with his ear, no headache, no dizziness and no roaring in his head prior to that time and immediately after the blast, the symptoms set up that he complained of, I would not associate that with an injury to his ear from a blast in his case because he told me that the loss of hearing was not then, it was several days later. The loss of hearing would not be progressive from an air [67] concussion.

(Testimony of Dr. C. R. K. Swetnam.)

The loss would happen immediately. Tenitis is simply the Latin word for noises in the ear.

If a man was suffering from a blast which caused an injury to a nerve of hearing, he would have dizziness and tenitis and might or might not have a rupture of the ear drum.

The cochlea is the end of the auditory branch of the eighth nerve. If absolutely broken, it could not be repaired but if the hearing was impaired by an injury to that nerve, there is no treatment that will relieve it except time, depending upon the actual condition of that nerve. For practical purposes, a complete recovery might be had. Jaber was very nervous when he came to see me.

Redirect Examination by Mr. ANDERSON.

Page 219—Transcript of Evidence.

The condition which I found in this man's ear might clear up in time, depending upon the amount of the poison in his body.

Recross-examination by Mr. WALTON.

The possibility of recovery would also depend upon the character of the injury if it had been due to an injury. I cannot prove that it was due to a toxic condition of this man's body.

Redirect Examination by Mr. ANDERSON.

Page 220—Transcript of Evidence.

Treating the man as a patient and not as a court case, my opinion is that the trouble with this man's ear was due to a toxic condition.

(Testimony of Dr. C. R. K. Swetnam.)

Recross-examination by Mr. WALTON.

In examining this man I was acting toward him as a patient of my own, not because he was sent to me by the defendant. I did not charge my bill to them. I did not consider him as their patient and never sent the bill to them. [68] They said they would stand good for it if he could not pay it. He offered to pay me at the time but he said he only had \$25.00 and I told him to keep it.

Redirect Examination by Mr. ANDERSON.

I endeavor at all times to give my best opinion according to my knowledge and judgment of the situation.

Testimony of Doctor Robert C. Buck, for Defendant.

Page 222—Transcript of Evidence.

Doctor ROBERT C. BUCK, a witness on behalf of defendant, being duly sworn testifies as follows:

Direct Examination by Mr. ANDERSON.

My name is Robert C. Buck. I am a physician in the employ of the United States Public Health Service stationed at Whipple Barracks, Arizona. I am a regularly licensed physician and surgeon. I had general practice about five or six years. Then I specialized in private practice—then about two years in the army during the War in the eye, ear, nose and throat department, at Camp Custer, Michigan, and three years in Public Health Service in charge of the eye, ear, nose and throat depart-

(Testimony of Dr. Robert C. Buck.)

ment at Whipple Barracks. I specialize in eye, ear, nose and throat work at Whipple Barracks. I was informed several days ago that I had been appointed by the Court to examine the plaintiff in this case. I examined the plaintiff's ear last Thursday. I made no general examination. I examined his ears to see whether or not he could hear. After the examination, it was my opinion that he could hear equally well and very well in both ears at the present time. There is no difference in either ear in my opinion at the present time.

I put him through about the usual routine examination [69] that I make of all patients. It is one of my duties to make a routine entrance examination of every patient entering the hospital at Whipple Barracks. We have about 575 now and I put him through about the usual routine examination, with some additions, to cover the possibility of malingering. The first test which I gave him is known as the Weber test. This consists of sounding a tuning-fork and placing the handle on the forehead. The sound waves are carried by bone conduction to the internal ear to the nerve endings. It is entirely different that sound conveyed through the ear, particularly as the fork would be held in front of him here like this (indicating). The fork is held on the forehead and all sound is carried through the bones to the ear. In this test, if there is an internal ear deafness, the sound will be referred to the well or best ear. We use this too as a diagnostic point in differential diagnosis between

(Testimony of Dr. Robert C. Buck.)

the internal ear deafness or nerve deafness, and middle ear deafness. If it is a case of middle ear deafness, the sound will be referred to the poor or deaf ear. If it is nerve deafness or internal ear deafness, it will be referred to the good ear. That is for the reason that sound waves coming through the natural course into the ear meet the obstruction in the middle ear and are interfered with, while sound waves coming down through the bone is carried direct to the nerve through the bone and the good ear, in internal ear deafness, will hear that and the poor ear not so well. In the test which I gave him, I asked him if he could hear the fork when I held it to his forehead and he said he could and I asked him to tell me which ear and he could not tell which ear it was. I tried him two or three different times and he could not tell which ear it was. That is characteristic where there is no difference in the hearing of the two ears. They will say they [70] do not know which ear they hear it in. They can't tell. Now, if the man has an internal or nerve deafness, it is certain that that sound wave is going to be referred to the well ear and he is going to hear it better in that ear. If he has a middle ear deafness, which is not claimed in this case, it is going to be heard best in the poor ear. This man seemed to hear it equally in each ear. That was the first test. Then I compared the two ears with—by means of tuning-forks and whistle and he responded perfectly normal in the right ear but he could not hear sounds, he says, with

(Testimony of Dr. Robert C. Buck.)

the left ear, that is, certain sounds. Now, if it is a nerve deafness or internal ear deafness, the high notes of the scale produced by a whistle will not be heard. We have to open the whistle up and produce a considerably lower tone before they can hear it. That occurred in his case but with a low tuning-fork, which has only twenty-six double vibrations per second, it is about equal to a very low pipe-organ and he could not hear that either. Now, he should hear that in an internal ear deafness, that is, he would be very apt to. Then, I took a stethoscope.

The stethoscope consists of two ear pieces which fit snugly into the ear and come down together at about this point (indicating) into one opening. I disconnected the tube on the right side and crowded it tight with cotton, so that no sound could go through that right tube going to the right ear and then I applied it to his ears, sounded the tuning-fork and held it in front of this opening and he heard the tuning-fork as long as it would ordinarily be heard and as long as it continued to vibrate—until the sound was practically gone and about as long as any one could hear it. Now, that sound could not have been conveyed through the tube to the right ear, because that right tube was plugged tight. I tried it on myself too, so that [71] any sound that he heard must have come through that left tube to the left ear and have been perceived by that ear and he heard through the stethoscope sounds which he claimed he did not hear when the tuning-

(Testimony of Dr. Robert C. Buck.)

fork was held directly in front of his ear. I also gave him what is known as the turning test to observe his nystagmus. I think it is a pretty well-known fact that if a person turns himself around a number of times and then stops he will be dizzy—everything is swimming. That is due to the—what takes place in the internal ear, the equilibrium mechanism, and for one ear we turn in one direction about eight or ten times and then stop them and have them look at the finger and follow it out in this direction (indicating) and the eyes will normally in a perfectly normal person—the eye will twitch towards that finger and it will gradually slow up. It will twitch from perhaps twenty-five to thirty seconds and we turned them one way for one ear and the other way for the other. I took this nystagmus test. I found that his nystagmus was equal either way that I turned him, showing that there was apparently no interference in the internal ear with his equilibrium mechanism.

He could not hear in his right ear through that stethoscope. That right tube was plugged tight. If he did get any hearing or did get any sound, which he says he did—admits he did—

Q. Did the patient know that that other side was plugged?

A. I don't think so, because, to continue the test and make it more complete, I did not, as we sometimes do, blindfold the eyes. I let him have his full vision. When I would compress the right tube and he saw that I would compress it, immediately

(Testimony of Dr. Robert C. Buck.)

the sound was shut off and he could not hear it. [72] If I pressed the left tube and left the right open, he claimed he could hear it again.

Q. During that time, he could only hear actually in the left ear? A. So far as his knowledge of my interfering with this tube, if I left them alone and his not knowing that that tube was plugged, he heard perfectly.

Cross-examination by Mr. WALTON.

Page 229—Transcript of Evidence.

I plugged this stethoscope after I had taken the Weber test, the tuning-fork test and the whistle test, I plugged it solid with cotton. I did not plug the man's ear. I do not admit that cotton is useless in stopping sound. In plugging a rubber tube 14 inches long with cotton, it is not going to convey sound. I am not familiar with Doctor McKenzie's work but I am with some others and know this stethoscope test is a standard test for malingering. I got it from Doctor Phillips. He says to plug with cotton, I think. He does not say to plug the stethoscope with wax. While it is true that Doctor McKenzie says that cotton or wool plugs, though popular are practically useless, as plugs when placed in the ear to keep out artillery fire, I do not agree that cotton does not obstruct sound or concussion when plugged in a tube twelve or fourteen inches from the patient's ear but it is common knowledge that when cotton is placed in a person's ear that he cannot hear very well with that ear. I know that the cotton placed in the tube of the stethoscope stops

(Testimony of Dr. Robert C. Buck.)

sound because it stopped the sound for me and I have normal ears. I did not plug the tube with wax or wood because I was in a hurry. I packed it with cotton so tightly that I had difficulty in getting it out afterwards. Any solid or semi-solid or liquid substance is a perfect conductor of sound if the instrument which produces the sound comes in contact with one part of that and the ear in contact with the other. But my tuning-fork did not touch the stethoscope. I examined this man's ear to see [73] if the ear drum was punctured. It is not necessary to puncture the ear to injure the nerve of the cochlea. I do not agree with Doctor McKenzie's statement because common experience is that you can plug the ear with cotton and shut out a great deal of sound. His statement applies to men who are working in occupations where there is continuous and extremely loud sounds and explosions. Noise and sound are the same in quality but there is a great deal of difference in quantity. A cotton or wood plug might be practically useless for the explosion of a cannon or for a boiler-worker or something of that kind where there is an extreme amount of sound but it would be adequate to shut out the delicate sound of a tuning-fork. I would probably agree with Doctor McKenzie that cotton stuffed in the ear would not be adequate to keep out a large volume of sound that you would get from the explosion of a cannon or high explosives or work in a boiler factory where the steam riveters are at

(Testimony of Dr. Robert C. Buck.)

work but I do believe that it would be entirely adequate to keep out the sound of a tuning-fork.

When I did not interfere with either tube with my fingers and he did not see me interfere and I held the tuning-fork in front of the stethoscope he said he heard that and heard it until it practically stopped vibrating. As the tube to the right ear was plugged, he must have been hearing out of his left ear. This man was not blindfolded when I was making the tests because I wanted some of the stuff from his own mind. You could make this stethoscope test by getting behind the patient but I had a reason for letting this patient see what I was doing.

Testimony of Doctor C. E. Yount, for Defendant.

Page 260—Transcript of Evidence.

Doctor C. E. YOUNT, a witness on behalf of defendant, being duly sworn, testifies as follows:
[74]

Direct Examination by Mr. ANDERSON.

My name is C. E. Young. I am a physician and surgeon located in Prescott, Arizona. I am engaged in general practice. I have been practicing in Prescott 11 years less 2 years and 11 months in the army. I am a regular licensed physician and surgeon in this state. I had 26 months in hospital work in the hospitals of Washington, D. C. I have had post graduate work at Harvard Medical in diseases of the nose and throat. I have had post

(Testimony of Dr. C. E. Yount.)

graduate work at Tulane University, New Orleans. I am consulting specialist in general surgery at the Veterans Hospital here.

One of the first symptoms of nephritis or Bright's disease is disturbances of the digestive tract, stomach trouble commonly called. If the doctor takes this reading and examines the urine, he may arrive at a diagnosis. If he does not, there will probably be other symptoms of headache, dizziness, ringing in the ear and sometimes even shortness of breath. These are more or less the earlier stages of nephritis. At first if the patient is showing symptoms of poisoning, damming up all things which should be thrown off by the kidneys, we would try to unload these. We would put him to rest in bed on a diet which is easily handled, making very little waste for the kidneys to eliminate, usually a milk diet. The rest in bed is very essential. Nature must make the restoration and we assist. Albuminaria with casts would show improper kidney function which we term nephritis or Bright's disease. In such a condition the best thing for the patient would be to go to bed on a liquid diet, largely milk. Pus in the tonsils and pus around the teeth would have a tendency for systematic poisoning. Poison from infections would be to impair the functions of the system. It might center on one organ or several organs and ultimately [75] it would make him sick.

(Testimony of Dr. C. E. Yount.)

Cross-examination by Mr. WALTON.

(Page 264 of the Transcript.)

A little pus in the tonsils or around the teeth would sooner or later produce a toxic condition of the system. Even though the man were 27 or 28, it would depend entirely on how bad the poison was and if his resistance to the germ is high enough, he can build up a carrier against it but if that power is broken down, he may show symptoms very early, even earlier than that age. Simple albuminaria is not Bright's disease. It might not come from the kidneys. It might come from the bladder or other part of the tract. We could not say it was nephritis if there is just albuminaria. Casts are cylindrical bodies thrown off because of diseased conditions in the tubules in the kidneys. You cannot see them without a microscope. Nephritis is a progressive disease. It is not a primary disease. I mean that it does not start without some other cause. Kidneys are eliminative organs and when they are crowded, they give way under it. The first symptoms of nephritis is gastric disturbances. I think it is the thing most frequently overlooked because the stomach is not doing its work and the doctor gets busy on the stomach and as a matter of fact there is something behind it all. Next I think casts very probably and sometimes the eye specialist can find inflation in the eye and the ear specialist may find it in the drum or by tests in the ear. If there is great damming up of poisons which should be thrown off,

(Testimony of Dr. C. E. Yount.)

there is probably increase in the blood pressure, slow pulse. Of course we have the ear symptoms or very often improper hearing just as there is improper eye sight and dizziness. Roaring in the ears. This may appear in both ears or in one ear. If there was a previous ear disease it would probably show first in the ear that was previously diseased. [76] If there was no previous ear disease, I would expect to find it in both ears simultaneously. The ringing in the ear may be caused from high blood pressure or it may come from the effects of the poison circulating there in the nerve endings. We also have ringing in the ear from low blood pressure. Just before a patient faints, you have an extreme ringing. You may have ringing in the ear with normal blood pressure. My opinion is based both upon attending patients suffering from nephritis and information received from books.

Testimony of Robert F. Pate, for Defendant.

Page 269—Transcript of Evidence.

ROBERT F. PATE, a witness on behalf of defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. ANDERSON.

My name is Robert F. Pate. I am a motorman working for the United Verde Copper Company at Jerome. I have been working there off and on for the last five years. I was working for them as a motorman in June, 1922, at the 1000 foot level. I know the plaintiff, Joe Jaber. I know Mr. Will-

(Testimony of Robert F. Pate.)

iams sometimes called Shoemaker. They were working there in June of 1922. I remember when Mr. Jaber put in a few shifts on the 1000-foot level not over a week or so. He was working with Williams at that time.

I was motorman there at the time Jaber and Williams were working on the 1000. I was back and forth all of the time.

(Questions on *Voir Dire*.)

I was operating a motor, moving the trains in and out of the tunnel. I stayed on my motor most of the time. While Shoemaker and Joe Jaber were working there I had my motor pulled up within 20 feet of Chute No. 2. The car man was there beside [77] me. There was a crew of three men. There was Williams and Mr. Jaber. The third man was myself. I was in my motor when a blast went off in either chute No. 2 or No. 3. There never were more than one or two shots at the most. There was no complaint of anyone getting hurt at that place. Mr. Jaber didn't complain at that time.

Cross-examination by Mr. WALTON.

Page 275—Transcript of Evidence.

I do not know how many blasts were set off. We were blasting on and off. I do not know what blasts were set off when I was not there. There was no blasting when I was not there. The orders were that they were not to do any blasting when I was not there because I was responsible for my two men. I set most of the blasts off myself. Mr. Shoemaker was not supposed to do the shooting.

(Testimony of Robert F. Pate.)

If he did, he did it on his own hook. We never had to blast these shots over a couple of times.

Redirect Examination by Mr. ANDERSON.

Page 277—Transcript of Evidence.

The reason we blasted was so that we could load the ore into the cars.

Recross-examination by Mr. WALTON.

Page 277—Transcript of Evidence.

I had charge of the blasting. At that time I did the blasting but now they have a miner who does all of the blasting.

Redirect Examination by Mr. ANDERSON.

Page 278—Transcript of Evidence.

We never blast unless the ore was stuck in the chute and would not come down in the cars and we never blast any other time.

Mr. ANDERSON.—Defendant rests.

PLAINTIFF'S EVIDENCE IN REBUTTAL.

[78]

Testimony of M. Farrage, for Plaintiff (In Rebuttal).

Page 279—Transcript of Evidence.

M. FARRAGE, a witness on behalf of plaintiff being duly sworn, testified as follows:

My name is M. Farrage. I live in Jerome. I lived there in June, 1922. I am a merchant there and have been such for seven years. I know Joe Jaber. I accompanied him to the United Verde Hospital about the 27th or 28th of June, 1922. I

(Testimony of M. Farrage.)

took Joe Jaber on the first of July, I think, and asked the doctor to put him in the hospital. Doctor Carlson and Doctor Tom. I told them he was so dizzy he could not sleep in his room. He said he was dizzy from a blast in the mine but the doctor said there was nothing of the kind. He told the doctor he was hurt from that shot and the doctor, I don't know if it was Tom or Carlson asked him how far he was from the blast. He said about 35 or 40 feet. The doctor said, I don't think it is from that but we'll take care of you and put you in the hospital for a while and find out."

No cross-examination.

Testimony of Dr. J. B. McNally, for Plaintiff (In Rebuttal).

Page 281—Transcript of Evidence.

Doctor J. B. McNALLY, a witness on behalf of plaintiff, being duly sworn testifies as follows:

Direct Examination by Mr. WALTON.

My name is Doctor J. B. McNally. I live in Prescott, Arizona. I have lived here over 26 years.

Doctor McNally's qualifications in every respect was admitted by Mr. Anderson for the defendant.

If a man has a tooth or a number of teeth loose from pus around them, they will never tighten again. That is, they will never tighten permanently. I examined Joe Jaber two or three days ago. I examined his blood pressure. It was 130, [79] normal for a man 28 years old. Continuous dizziness and noise in the ears is sometimes

(Testimony of Dr. J. B. McNally.)

found in nephritis of old standing. Chronic Bright's disease in aged people. People where there is hardening of the ossicles of the ears and where arterio-sclerosis and hardening of the arteries of the whole body, high blood pressure incidental to nephritis. Hardening of the arteries is usual in advanced cases of chronic Bright's disease. It is not likely that a man would have an advanced case and still have normal blood pressure. In cases of chronic nephritis the noise is usually in both ears and is usually a crackling noise. Sometimes it runs along like a hum and then there will be all of a sudden a crackling, irregular condition. In the case of an accident to the ears, there is an ordinary howling noise such as a buzz which is constant and does not change. This is not likely found in nephritis. I examined Mr. Jaber's urine. I found albuminaria. I did not find any true casts.

If a man was in an advanced state of nephritis, with noise in his ears and deaf, he would be anaemic, round and hardened pulse which I do not find here in this case. I found a soft pulse, regular and about normal.

Cross-examination by Mr. ANDERSON.

Page 284—Transcript of Evidence.

I found no true casts. He may not be suffering from kidney trouble if it is albuminaria. There is lots of albumin from the system. It is one of the symptoms of nephritis or Bright's disease. I tested his hearing. His hearing is very poor in his left ear. I also examined his ears. I found that in

(Testimony of Dr. J. B. McNally.)

the left ear, the drum had lost its mother-of-pearl appearance and was sluggish looking and more or less slightly congested, a little retracted into the middle ear. Did not shine on the application of light, was dull and heavy. The right ear was slightly impaired too. There was a slight impairment [80] or slight retraction and loss of brilliancy of lining membrane or tympanium or drum of the right ear. I think there might have been an infection in the body somewhere. I inflated the middle ear with the eustachian catheter; that is the left ear and it was very easily inflated. Albumin in the urine usually is indicative of some pathological condition. If there is pus around the teeth, then there is a destruction of the tissue in the cavity where the teeth reside, usually leaving the cavity too large for the tooth so that the tooth is loose and wiggles. The pus is the basis of the infectious condition. What we look for is not the looseness of the tooth but the pus, to see if there is any infection there. In addition to the albuminaria test, I made the sugar, albumin and cast test. The specific gravity was within the range of normal. I found no sugar and no true casts. There is noise in the ear in acute nephritis but we find it more often in chronic nephritis. The leading symptoms of acute nephritis is scanty, highly colored urine with a heavy specific gravity, probably some swelling or dropsical condition. His entire system somewhat heavy, backache. If a patient came to me with dizziness, ringing in the ear, his tongue

(Testimony of Dr. J. B. McNally.)

coated and the next day or two, on examining his urine, found there was a good deal of albumin and casts, I would put him to bed on a bland liquid diet. By bland liquid diet I mean milk and water. If there were symptoms more urgent, I would probably sweat them, clean them out thoroughly, keep their liver and bowels working, open up the avenues of elimination as much as possible.

Redirect Examination by Mr. WALTON.

Page 290—Transcript of Evidence.

If a patient came to me and said that immediately after a blast went off he began suffering with a noise in his ear, headache and dizziness, I would make an examination and [81] see the condition of the ear. If he had a little albuminuria and suffers from a blast and immediately tenitis starts and dizziness starts, I would naturally infer that there was some injury to the mechanism of the ear or both ears as the case might be. Usually the one nearest the blast. It would be rather suspicious one ear being infected that way. Of course I did not see him until about day before yesterday. I don't know what condition his ear was in a year ago. The symptoms of constant ringing in the ear, dizziness and pain in one ear can be associated with an injury by a concussion or blast.

Testimony of W. V. DeCamp, for Plaintiff (Recalled—Cross-examination).

Mr. DeCAMP, a witness for defendant, was recalled for further cross-examination by Mr. WALTON.

The bottom and sides of the chutes are lined with one-inch steel plate. They are not set on the rock but on "I" beams. The chutes are made of steel plate, not particularly to withstand the blasting. The greatest wear and tear and strain comes from ore continually passing through the chutes. The No. I and No. II chutes extend to 300-foot level—about 700 feet long. We usually blast only once or twice. In chutes No. 1 and No. 2, they load a train of ten cars, 20 tons to each car in seven minutes and there is no blasting. Steel plates were not put in in relation to the heavy blasting. It is for the wear they are subject to with the passing of 500 to 1500 tons a day passing through each of the chutes. We are passing an enormous tonnage of rock. Chutes Nos. 1 and 2 are 26 inches wide. We have recently enlarged Nos. 3 and 4 to four feet eight inches wide. Chutes Nos. 1 and 2 are 26 inches high. Usually the rock going down through these chutes are passed through a crusher above which is 16 inches wide. [82]

Testimony of Mike Krnich, for Plaintiff (In Rebuttal).

MIKE KRNICH, a witness for plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. WALTON.

Page 295—Transcript of Evidence.

I am a miner, have been since 1903. I have mined pretty nearly all around United States, Alaska, Nevada, California, Arizona. I worked for the United Verde Copper Company at Jerome about August 28 last year. I am acquainted with the steel chutes in the mine and I am acquainted with the blasting there. The amount of powder put in a chute depends on how a chute is blocked up. If it is a big boulder, you put in four or five sticks. If it is high up 20 feet, you can't go up there. You would tie it to a wooden stick and tie five or ten sticks through that door and explode it. If it is 40 or 50 feet high you've got to put more powder. Lots of times you have to blast several times. I blasted one day eight times. If it doesn't come you keep increasing the powder. In case of a wide place, there is no protection. But if there is a pillar between the blasting and the place where you are, you can stay about 8 feet. You should go out about 100 or 75 feet anyway. If I was blasting I send men on one side and I go on the other to watch that somebody don't come. If you are in the middle of the tunnel, you go from 60 to 100 feet away not in the middle of the tunnel but on the sides, be-

(Testimony of Mike Krnich.)

hind the post or some place where it is somewhat protected. If a man is close to a chute and keeps his mouth closed, why it can jar his stomach. There is smoke and dust and you have to keep the mouth closed. The jar may effect the ear. The chutes are made from steel to protect them from blasting and heavy weight. [83]

Cross-examination by Mr. ANDERSON.

Page 299—Transcript of Evidence.

We go down the tunnel to get away from the rocks. You must also be afraid of the concussion. I blasted with 14 sticks once but I blasted with less than that. Stick and a half on ground like that don't amount to much. If the whole chute is clogged you use a heavy blast. If it is only a boulder, you use a small blast.

Recross-examination by Mr. ANDERSON.

Page 301—Transcript of Evidence.

I am not working now. I have not worked for about six months. I was not working in the mine at Jerome in June, 1922.

Testimony of Joe Jaber, in His Own Behalf (Recalled—In Rebuttal).

JOE JABER, the plaintiff, was recalled as a witness in rebuttal on his own behalf.

Direct Examination by Mr. WALTON.

Page 302—Transcript of Evidence.

I do not know Mr. Pate who was on the witness-stand. I did not see him there when Shoemaker

(Testimony of Joe Jaber.)

and Zanovish were working with me there. I know a fellow was on the motor but I don't remember who it is. I don't remember for sure if the man on the witness-stand is him or not. I don't remember if I saw Mr. Pate on the motor in the tunnel. I don't remember if he was there when I got hurt. I think it is but I don't know for sure. When I was hurt I called one fellow. I don't remember who it is but even if I seen him, I can't tell who it is because I was too sick from the first. I saw a man help me and I don't know him for sure and I don't know his name either. When he helped me I asked him to call the cage for me. He says, "I am just a stranger like you. I don't know how to call the cage." When I first saw Doctor Tom, I told him about the blast. Mr. Farrage was with me the first time I saw Doctor Tom. I did not tell Doctor Swetnam I was 75 or 80 feet from the blast. I told him 30 or 35 feet, maybe 40. [84] Before the blast that hurt me went off, that chute had been blasted six or seven times. I asked him why he blasted there and he said, "This chute is full of water and iron and timber and plugged right close to the door." Right after I was hurt I told Shoemaker about it and he laughed at me. Doctor Tom told me that Shoemaker reported to him about the blast.

Mr. WALTON—Plaintiff rests.

(Argument by counsel to jury.)

Whereupon the Court instructed the jury as follows:

Instructions to the Jury.

Page 307—Transcript of Evidence.

The COURT.—Gentlemen of the jury: It now becomes my duty to charge you as to the law that will guide you in your deliberations in this case. In the trial of civil cases, it is the exclusive province of the jury to determine the facts. It is the exclusive province of the judge of the court to charge the jury as to the law by which they must be guided in the consideration of the case and this law as stated to you in these instructions it is your sworn duty to accept and follow as the law of this case. Any ideas that you may have as to what the law should be, it is your duty to disregard and to be governed by the law as given to you by the Judge of this court. If the Court commits any error in stating the law to the jury, that error may be corrected by the Court in the manner provided by law. This action is brought by the plaintiff, Joe Jaber, against the defendant, United Verde Copper Co., to recover damages for an injury resulting from an accident which he claims to have sustained on the 27th day of June, 1922, while the plaintiff was in the employ of the defendant. The action is based upon what is known as the Arizona Employer's Liability Act (Reading from Revised Statutes of Arizona, 1913, Civil Code): "Section 3154. That [85] to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said

Section 7 of Article XVIII of the state Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured. Section 3155. The labor and service of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section. By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein. Section, 3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows: Subdivision 8. All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters."

Under the Employer's Liability Act, the plaintiff, in order to recover, must show:

First: That the plaintiff was in the employ of the defendant.

Second: That the master was engaged in one of the [86] hazardous occupations and that the employment by the master of the servant, that is, the plaintiff in this case, was in such a hazardous occupation.

Third: That the accident, if any, was not caused by the negligence of the plaintiff. Under the Employer's Liability Law, the labor and service of a workman at manual and mechanical labor in the employ of any person, firm, association, company or corporation in and about a mine is service in a hazardous occupation within the meaning of the said Employer's Liability Act. The Employer's Liability Act covers other occupations but you are concerned solely with the question of whether or not the plaintiff was employed by the defendant and engaged in labor and service in and about defendant's mine.

As to the first question involved that the plaintiff was employed by the defendant, this fact must be established to your satisfaction by a preponderance of the evidence in the case. As to the second proposition that the plaintiff was engaged in one of the hazardous occupations defined in the Employer's Liability Act, I charge you that the plaintiff was engaged in one of the hazardous occupations defined by the said Employer's Liability Act. As to the third proposition that the accident, if any, was not caused by the negligence of the plaintiff, this fact also must be established to your mind by a preponderance of the evidence in the case.

If you find that the plaintiff was so employed by the defendant as alleged in the complaint, then when in the course of such work in a hazardous occupation as above defined, personal injury by any accident arising out of and in the course of such labor, service and employment and due to a condition or conditions of such employment or occupation is caused to or suffered by any workman engaged therein, in all cases in which [87] such injury of such employee shall not have been caused by the negligence of the employee injured, the employer of such employee shall be liable in damages to the employee injured.

Negligence, as applicable to a plaintiff in a case of this kind, is the doing of some act or the failure to do some act which an ordinarily prudent person under like or similar circumstances would or would not do.

You will notice that that for which the master is made liable under the Employers' Liability Act is an accident. The word "accident" as used in these instructions and as used in the act means an untoward and unforeseen and unexpected event. It arises out of and in the course of such labor, service and employment if the employee injured was actually at the time of the injury engaged in the work and labor wherein he was employed; and it was due to a condition or conditions of such occupation or employment, if such accident was incidental and due to the hazardous occupation wherein he was engaged.

Prior to the passage of the Employers' Liability Act, the master was liable only where the master had been guilty of some negligence. Otherwise, there was no liability. Under the Arizona Employers' Liability Act, the law has been changed and in order for a plaintiff to recover, he does not have to show that his injury, if any is proved, was caused by an accident due to the negligence of the defendant. In other words, in this case, in order to entitle the plaintiff to recover, it is not necessary that the plaintiff should prove that the defendant, United Verde Copper Co., was negligent in any manner or form. However, the employee can only recover if such accident was not caused by his own negligence.

If you find that the injury, if any, was the result [88] of an accident as hereinbefore defined and for which the plaintiff was not to blame, then you will find that the plaintiff was not negligent.

The negligence on the part of a plaintiff in order to bar a recovery must have been the proximate or producing cause of the accident.

You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that on the 27th day of June, 1922, the plaintiff, Joe Jaber, was in the employ of and was employed by the defendant, United Verde Copper Co., at and in its mine underground and that his duty under such employment required him to be in said mine, and in the performance of his duty under such employment, the said plaintiff, without any negligence on his part, received any personal injury as alleged

in his complaint herein, which injury was occasioned by an accident arising out of and in the course of his labor, service and employment, and was due to a condition or conditions of plaintiff's occupation or employment, then the Court instructs you that under those facts, if you find them to be facts, the plaintiff is entitled to a verdict against the defendant in some amount of money which would be reasonably sufficient in dollars and cents to compensate the plaintiff for the injuries thus sustained by him.

If you find from the evidence under the instructions of the Court that the plaintiff is entitled to a judgment against the defendant in any sum as damages because of personal injuries received by him, as alleged in his complaint, it then becomes your duty to fix the amount of damages to which the plaintiff is entitled; and in so doing, you will allow such damages as seem to you to be right and proper under all of the facts and circumstances in the evidence. The elements which [89] enter into fixing damages are sometimes definite and sometimes indefinite. Loss of plaintiff's employment since the injury is susceptible of proof with reasonable accuracy and in fixing the amount of damages, if any, to be allowed by you for this item, or element of damage, you must be governed by the evidence submitted in this case.

In estimating the total damage, if any, that you find the plaintiff entitled to, you have a right to consider the bodily and mental pain, both past and future, if any, and the permanent injury to health and constitution, if any, and the plaintiff's dimin-

ished capacity for labor, if any, resulting from the accident which injured him, if the evidence shows these circumstances to exist.

These elements are seldom susceptible of definite proof as to amount in money and, therefore, such amount, if any, which shall be allowed by you for any or all of such elements of damage, must be and is to be determined by you from your own general knowledge and experience and your own good sense and good judgment, based upon the evidence in this case, keeping in mind the fact that the total damages should be such sum as will compensate the plaintiff for the injuries suffered by him, if any, in the accident complained of in his complaint. Judgment in no event shall exceed the sum of money prayed for in the complaint.

You are not permitted, gentlemen, to guess or speculate as to the amount that you may find for the plaintiff, if any, if you come to that question, but the amount should be the result of your sober judgment, based upon the evidence in this case, and from such evidence and the facts proved in the case, you should figure out how much the plaintiff has already sustained in damages, if any, and how much, bearing in [90] mind his life expectancy merely as tending to show his probable length of life, not the period of time that he is able to work, but taking all of these facts and from these facts try to figure out in your sober judgment what damage the plaintiff is likely to sustain in the future by way of loss of earning power to him. In doing this, you will take into consideration such sum as

will fairly and justly compensate the plaintiff for the value of his time while he may have been disabled by reason of such injuries from the date of the injury to the trial of this case, provided you find that he was disabled during such period or any portion of it and, if so, for how long a time, and compensation for loss of time must be based only on the time lost and must not in any event exceed the amount claimed in the complaint.

You may also consider whether the injury, if any, has impaired plaintiff's earning capacity in the future, and, if so, you should allow him compensation for such impairment. You may also take into consideration his age, his condition in life, any physical pain and suffering endured by him or that you may find that he will endure in the future as the result of such injuries, if any. You may consider whether such injuries, if any, are temporary or permanent. You may also consider whether the plaintiff in the future will be able to continue the work heretofore followed by him and you will limit your consideration of the damage to the impairment of his earning capacity and to the pain and suffering which he has endured or may endure hereafter, as the evidence may indicate. In short, if you find that the plaintiff has been injured as alleged, you should award him such sum as will reasonably and fairly compensate him, not to exceed the sum prayed for in the complaint.

By a preponderance of the evidence does not necessarily [91] mean the greatest number of witnesses on one side or the other, but it means the

weight of the evidence, the degree of proof which is more convincing and persuasive to your minds, which satisfies your minds to that extent that you may act upon it as intelligent jurors.

Certain physicians have been called as expert witnesses in this case and the evidence shows that one of such witnesses was appointed by the Court at the request of the defendant to examine the plaintiff to determine his present condition. The law of the State of Arizona permits this to be done and provides that the person so requesting such appointment shall pay and compensate such physicians for their services. While a physician may be appointed by the Court under said Arizona statute to make such examination and is permitted to testify in the case as to the result of his examinations, the Court in no way vouches for the knowledge or credibility of such witness and the credibility and the weight to be given to the testimony of such witness is to be determined by you by the same rules that apply to other witnesses in the case.

I mention this fact to you at this time so that you may bear it in mind in considering the instruction which is to follow:

You, gentlemen of the jury, are the sole judges of the credibility of witnesses and of the weight to be given to their testimony. In determining the credibility of any witness, you have a right to take into consideration his manner and experience while giving his testimony, his means of knowledge of the facts to which he has testified, any interest or motive he may have, if shown, and the probability

or improbability of the truth of his statements, when considered in connection with all other evidence in the case. [92]

If you find that any witness has wilfully testified falsely to any material fact, you have a right to wholly disregard the testimony of such witness, except in so far as the same may be corroborated by other credible evidence in the case.

Two forms of verdict have been prepared for you. One, "We, the jury duly empanelled and sworn in the above-entitled action, upon our oaths do find for the defendant." In the event that the plaintiff is not entitled to recover, you will use this form of verdict. The other, "We, the jury, duly empanelled and sworn in the above entitled action, upon our oaths do find for the plaintiff in the sum of ——— dollars." In the event that you find for the plaintiff, you will insert the amount of damages which you find the plaintiff entitled to recover in the blank space and use this form of verdict.

When you have retired to the jury-room, you will elect one of your number as foreman of the jury and when you have agreed upon a verdict, you will cause your foreman to sign that verdict which represents your conclusion and return it into open court.

Your verdict must be unanimous.

THEREUPON, at the close of the instruction by the Court to the jury, the defense excepted to the refusal of the Court to grant instruction No. 1 requested by defendant and exception was directed

to be noted by the Court, which instruction was as follows:

“The Court instructs the jury that under the Employer’s Liability Law the employer is liable to the employee only when the injury is caused by an accident arising out of and in the course of the labor, service and employment of the employee and due to a condition or conditions of such occupation or employment and only when such injury shall not have been caused [93] by the negligence of the employee injured. Such law does not cover ordinary sickness, even though such sickness was contracted during the course of the employment; unless you can say that the accident caused the sickness, and if you believe from the evidence in this case that the alleged concussion did not cause plaintiff’s injury, then he cannot recover even though you do find that he is suffering and has suffered from some disease, I further charge you that even though you believe the plaintiff was suffering from deafness or other trouble and that said deafness or other trouble was occasioned by disease and not by an injury received while in the employment of United Verde Copper Company, then he cannot recover. The law does not cover or contemplate payment for any disease and in this case the plaintiff claims to have been injured by an accident and that accident caused his injury and the proof is not made out by showing that he was suffering from some disease. You cannot and must not permit your

sympathy for a man who has been sick or diseased to give him damages or compensation, because under the law he is not entitled to it and all humanity must suffer the effects of certain diseases.”

THEREUPON the jury returned into open court their written verdict, finding in favor of the plaintiff and assessing his damages at the sum of One Thousand (\$1000.00) Dollars.

The foregoing bill of exceptions contains all of the evidence received upon the trial of this action or relating to the foregoing exceptions.

AND, WHEREAS, the matters and things above set forth do not duly appear of record, the defendant United Verde Copper Company presents its bill of exceptions in said cause, and prays that the same may be signed and sealed and made of record in this cause by this Honorable Court pursuant to the law in such cases. [94]

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

Approved:

Attorney for Plaintiff.

Order Settling Bill of Exceptions.

The foregoing bill of exceptions having been presented to me for allowance within the time fixed by order of the Court for such purpose, and the same having been examined by me and found to be correct, the same is now, on this 15th day of

October, 1923, duly signed, approved and allowed, and made a part of the record herein.

F. C. JACOBS,

Judge of the United States District Court.

[Endorsed]: No. L. 128. Bill of Exceptions. Filed Oct. 5, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [95]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

The United Verde Copper Company, a corporation, incorporated under the laws of the State of Delaware, duly authorized to transact business in the State of Arizona, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered in accordance therewith on July 3, 1923, comes now by Anderson, Gale & Nilsson, its attorneys, and petitions said court for an order allowing said defendant to prosecute the writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made, and provided:

That in accordance with an order of this court dated July 20, 1923, this defendant filed a supersedeas and cost bond in the sum of Fifteen Hundred (\$1500.00) Dollars.

WHEREFORE defendant prays that an order be made that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals, and that a transcript of record, proceedings and documents upon which said verdict and judgment were based, duly authenticated, be sent to said United [96] States Circuit Court of Appeals of the Ninth Circuit.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: No. L. 128. Petition for Writ of Error. Filed Oct. 11, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [97]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the defendant, United Verde Copper Company, a corporation, duly incorporated under

the laws of the State of Delaware and authorized to transact business in the State of Arizona, by Anderson, Gale & Nilsson, its attorneys and in connection with its petition for a writ of error herein says that in the record and proceedings during the trial of the above-entitled cause and in said judgment in said District Court, error has intervened to its prejudice and this defendant here makes the following assignment of errors upon which it will rely in the prosecution of the writ of error in the above-entitled cause, to wit:

(1) United States District Court for the District of Arizona erred in denying and overruling defendant's motion for a directed verdict at the close of defendant's evidence.

(2) That the United States District Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs the jury that under the Employer's Liability Law the Employer is liable to the employee only when the injury is caused by an accident arising out of and in the course of the labor, service and employment of the employee and due to a condition or conditions [98] of such occupation or employment and only when such injury shall not have been caused by the negligence of the employee injured. Such law does not cover ordinary sickness, even though such sickness was contracted during the course of the employment; unless you can say that the accident caused the sickness, and if you believe from the evidence

in this case that the alleged concussion did not cause plaintiff's injury, then he cannot recover even though you do find that he is suffering and has suffered from some disease, I further charge you that even though you believe the plaintiff was suffering from deafness or other trouble and that said deafness or other trouble was occasioned by disease and not by an injury received while in the employ of United Verde Copper Company, then he cannot recover. The law does not cover or contemplate payment for any disease and in this case the plaintiff claims to have been injured by an accident and that accident caused his injury and the proof is not made by showing that he was suffering from some disease. You cannot and must not permit your sympathy for a man who has been sick or diseased to give him damages or compensation, because under the law he is not entitled to it and all humanity must suffer the effects of certain diseases."

(3) The verdict of the jury is contrary to law.

(4) The verdict of the jury is not supported by and is contrary to the evidence.

(5) The United States District Court of the District of Arizona erred in entering judgment upon the verdict and said judgment is contrary to the law.

(6) The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is not supported by and is contrary to the evidence.

(7) The United States District Court for the District of Arizona erred in refusing to grant the defendant a new trial. [99]

WHEREFORE said United Verde Copper Company, by reason of the errors aforesaid prays that said judgment against it, the said United Verde Copper Company, may be reversed, set aside and held for naught.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: No. L. 128. Assignment of Errors. Filed Oct. 11, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [100]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error and Stay of Execution.

Upon motion of Messrs. Anderson, Gale & Nilsson, attorneys for the defendant, and upon filing a petition for writ of error and supersedeas and cost bond in the sum of Fifteen Hundred Dollars

(\$1500.00) and Assignment of Errors, it is ordered that writ of error be and the same is hereby allowed to have reveiwed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein; and

The supersedeas and cost bond having been filed herein, it is further ordered that all proceedings herein be suspended until the determination of this writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 15th, 1923.

F. C. JACOBS,
District Judge.

[Endorsed]: No. L. 128. Order Allowing Writ of Error and Stay of Execution. Filed Oct. 15, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [101]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER CO., a Corporation,
Defendant.

Writ of Error.

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also

in the rendition of the judgment, of a plea which is in the aforesaid District Court before you, between Joe Jaber, plaintiff, and the United Verde Copper Co., a corporation, defendant, manifest error has happened to the great damage of the said defendant, as by its complaint and assignment of errors appears, we being willing that error, if any there has been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, to command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 16th day of October, 1923, and of the Independence of the United States the one hundred and forty-eighth.

[Seal]

C. R. McFALL,
Clerk.

By Paul Dickason,
Chief Deputy Clerk.

[Endorsed]: Filed Oct. 16, 1923. C. R. McFall,
Clerk. By M. R. Malcolm, Deputy Clerk.

Return on Writ of Error.

The Answer of the Judge of the District Court of the United States for the District of Arizona, to the within Writ of Error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal]

C. R. McFALL,
Clerk U. S. District Court for the District of Arizona.

By Paul Dickason,
Chief Deputy Clerk. [102]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128—(PRESCOTT).

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER CO., a Corporation,
Defendant.

Citation on Writ of Error.

The President of the United States to Joe Jaber
and Thomas P. Walton, Your Attorney,
GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein the United Verde Copper Co., a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable F. C. JACOBS, Judge of the United States District Court for the District of Arizona, this 16th day of October, 1923, and of the Independence of the United States the one hundred and forty-eighth.

(Sgd.) F. C. JACOBS,

United States District Judge.

I hereby certify that I received the within writ on the 16th day of October, 1923, and personally served the same on the 23d day of October, 1923, upon Thomas P. Walton, Atty. of record for Joe Jaber, by delivering to and leaving with Thomas P. Walton, Atty. of record for Joe Jaber, said plain-

tiff named therein, personally, at Phoenix, County of Maricopa, in said District, a certified copy thereof.

G. A. MAUK,
U. S. Marshal,
By T. E. Benton,
Deputy.

[Endorsed]: Filed Oct. 25, 1923. C. R. McFall,
Clerk. By Chas. H. Adams, Deputy Clerk. [103]

In the District Court of the United States in and
for the District of Arizona.

No. L. 128.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the writ of error heretofore sued out by the United Verde Copper Company and included in said transcript, the following pleadings, proceedings and papers on file, to wit:

- (1) Plaintiff's amended complaint.

- (2) Defendant's demurrer and answer.
- (3) The verdict.
- (4) The judgment.
- (5) All minute entries in this cause.
- (6) Bill of exceptions.
- (7) All exhibits offered by the defendant
whether admitted or refused.
- (8) Motion for new trial.
- (9) Order extending time to prepare bill of ex-
ceptions.
- (10) Order fixing amount of supersedeas and cost
bond. [104]
- (11) Supersedeas and cost bond and approval.
- (12) Second order extending time for filing bill
of exceptions.
- (13) Petition for writ of error.
- (14) Assignment of errors.
- (15) Order allowing writ of error.
- (16) Original writ of error.
- (17) Original citation on writ of error.
- (18) This praecipe.
- (19) Clerk's certificate.

The said transcript is to be filed with the Clerk of the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, before the 9th day of November, 1923.

ANDERSON, GALE & NILSSON,

Attorneys for Defendant. [105]

In the District Court of the United States in and
for the District of Arizona.

JOE JABER,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Cor-
poration,

Defendant.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Joe Jaber, Plaintiff versus United Verde Copper Company, a Corporation, Defendant, said case being number Law 128—Prescott on the docket of said court.

I further certify that the foregoing 105 pages numbered from 1 to 105, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such Clerk.

And I further certify that there is also annexed to said transcript the original writ of error, and the original citation on writ of error issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Forty-Eight and No./100 Dollars (\$48.00), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said court this 8th day of November, 1923.

[Seal]

C. R. McFALL,

Clerk of the District Court of the United States,
for the District of Arizona.

By Paul Dickason,
Chief Deputy Clerk. [106]

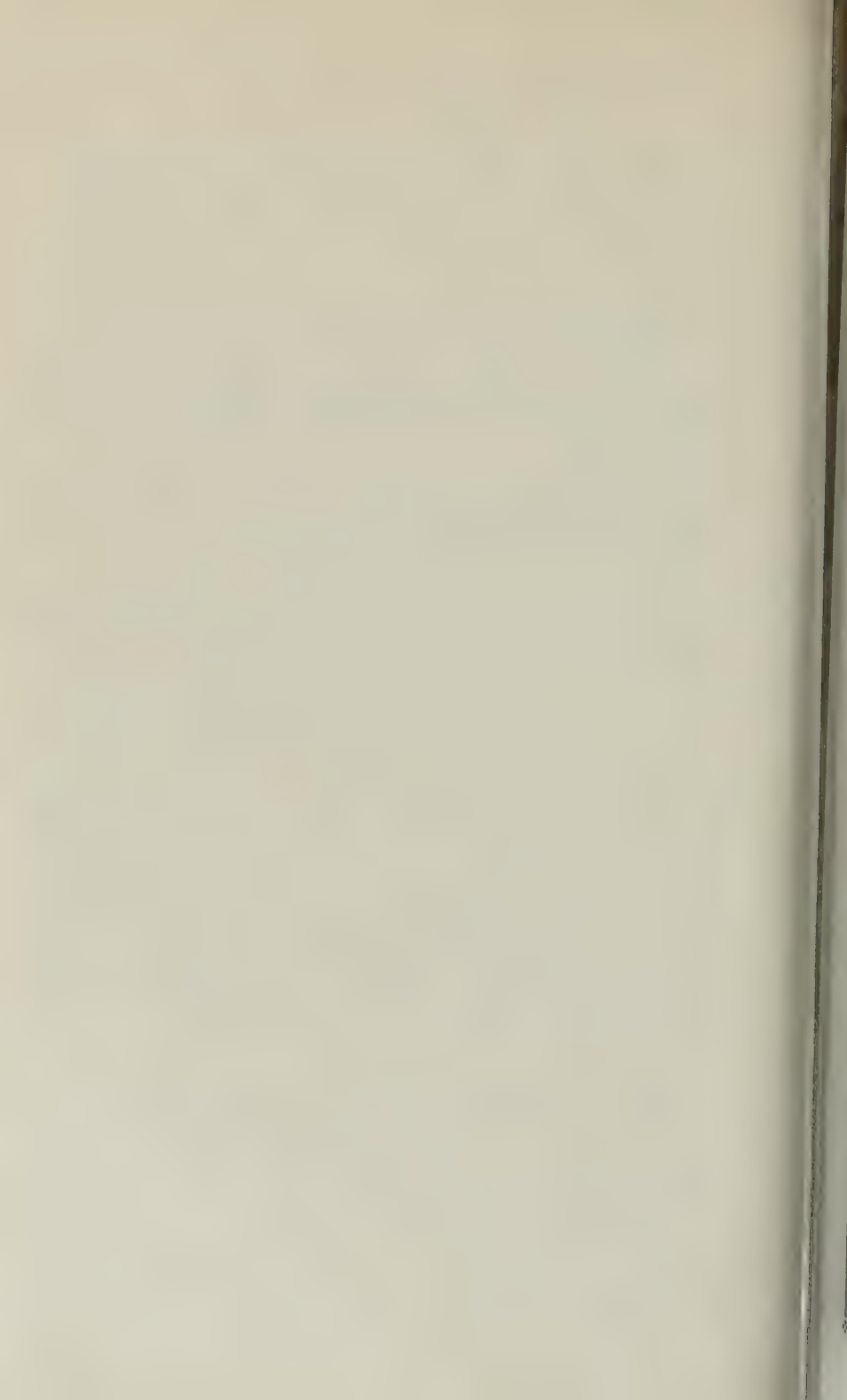
[Endorsed]: No. 4138. United States Circuit Court of Appeals for the Ninth Circuit. United Verde Copper Company, a Corporation, Plaintiff in Error, vs. Joe Jaber, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed November 10, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



No. 4138

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE COPPER COMPANY, a Corporation, Plaintiff in Error. vs. JOE JABER, Defendant in Error.	}
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Upon Writ of Error to the United States
District Court of the District of Arizona.

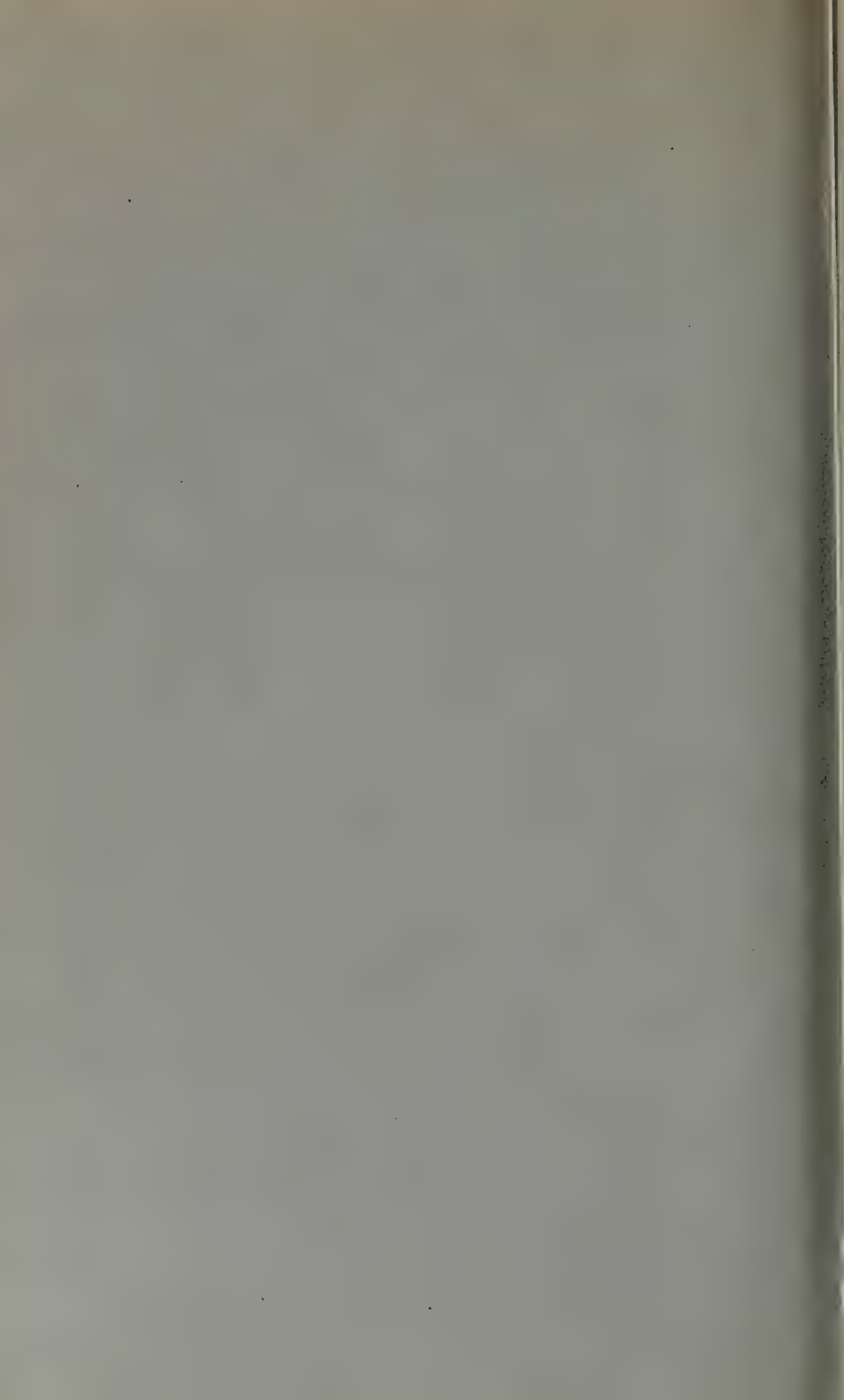
BRIEF OF PLAINTIFF IN ERROR

ANDERSON, GALE & NILSSON,
Attorneys for Plaintiff in Error.

Filed this.....day of....., 1923.

FRANK D. MOUCKTON,
Clerk.

By.....
Deputy Clerk.



UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE COPPER
COMPANY, a Corporation,
Plaintiff in Error.
vs.

JOE JABER,
Defendant in Error.

No. 4138

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

Defendant in Error, Joe Jaber, brought suit against the Plaintiff in Error, United Verde Copper Company, a corporation, in the Superior Court of Yavapai County, Arizona, for an alleged injury to his ear. The suit was brought under the Arizona Employers' Liability Law, claiming damages in the sum of Ten Thousand (\$10,000) Dollars. The suit was removed to the United States District Court for the District of Arizona.

Jaber was employed by the Copper Company as a mucker during the latter part of June, 1922, including June 27th of that year, the day upon which he alleges he was injured.

Jaber alleged in Paragraph IV of his Amended

Complaint (T. of R., p. 13) that his injuries were caused by an accident which was due to a condition or conditions of his occupation in the service of the defendant in a hazardous occupation.

That (see Paragraph III of said Amended Complaint, T. of R. p. 12) while in the employ of defendant and while plaintiff was in the pursuance of his duties, a heavy blast was set off in the near proximity to the plaintiff and that as a result of said blast, plaintiff suffered great pain in his left ear and has continued to suffer great pain in his said ear since said blast and that as a result of said injury and said shock caused by said blast, plaintiff has totally lost the hearing of said left ear.

The defendant denied and set up throughout the entire case;

1. That there was no blast in the vicinity of plaintiff sufficient to cause any injury to his ear, and,

2. That plaintiff was not injured at all but that he was suffering from disease occasioned by natural causes and that when he came to the hospital of the Company, he was suffering from said disease and was not suffering from any injury or accident whatsoever. The Company admitted practically throughout the trial that Defendant in Error had noises, pains and buzzings in his left ear but that the cause of said situation in the ear was the result of nephritis or Bright's disease and had no connection with and was not caused by any injury.

There were two defenses made by defendant:

1. That there was no blast set off in plaintiff's near proximity which could have caused the injury, and,

2. That the condition plaintiff complained of was the result of disease.

Jaber was working in the mine belonging to the Copper Company in what is known as the 1000 foot level, which is a large tunnel into which standard gauge railway cars are brought and loaded with ore.

It was the duty of Jaber to keep the floor of the tunnel and the tracks clear of ore or muck, which spilled over the sides of the cars when they were being filled, so that the cars could be operated thereon (T. of R., page 42).

The ore is loaded into the cars from what is called a raise or chute which comes out at the top of one side of the tunnel as illustrated in Defendant's "Exhibit 2" (T. of R., p. 19) and more fully described in the testimony of Mr. DeCamp on pages 61 and 62 of Transcript of Record.

Occasionally it becomes necessary to set off a blast in the chute because large rocks may arch at the point of discharge or the ore may be moist and so clog up the chute.

The Defendant in Error claimed that on the day in question, June 27, 1922, he was at work in the tunnel 35 or 40 feet away from the raise or chute, when a blast was set off in said raise or chute which injured his ear.

The theory of the Plaintiff in Error in its pleadings and at the trial was that the Defendant in Error was never injured either by a blast or otherwise but that he was suffering from nephritis or what is commonly called "Bright's disease."

The symptoms about which the plaintiff testified was that he had noises in his ear, buzzing and ringing in his ear and he claimed this was caused by a concussion from a blast. All of the physicians testified that this is known in medicine as tenitis and is one of the symptoms of "Bright's" disease. The physicians who testified for the plaintiff found no rupture of the ear drum so there was no external evidence of any injury. All of the conditions testified to by the plaintiff were explained by the physicians testifying for the defendant as symptoms of nephritis or "Bright's" disease.

Doctor Walsh who is employed at the Company's hospital, and who saw the Defendant in Error when he first came to the hospital, stated that Jaber made no claim of injury when he came to the hospital, but stated that he was sick. An examination by this doctor, at that time, showed that Defendant in Error was suffering from nephritis or "Bright's" disease (T. of R., pp. 76 and 77).

Doctor Carlson (T. R., pp. 68 to 73) and Doctor Yount (T. R., pp. 89 to 92); witnesses on behalf of the Plaintiff in Error, testified that the Defendant in Error had "Bright's" disease and had no injury to his ear. Doctor Swetnam (T. R., pp. 73 and 79)

and Doctor Buck (T. R., pp. 82 to 89), were ear specialists, who also testified on behalf of the Plaintiff in Error and testified that Defendant in Error had no injury to his ears, and that his condition was due to disease and not any blast or concussion.

The whole theory of defendant's case was that this man had become sick and diseased and upon quitting his work and coming to the hospital of defendant company, the company doctors at that time and other doctors subsequent thereto found that this man was suffering from nephritis and that it had no connection whatsoever with any accident. The defendant company admitted, during the trial, that this man was still sick and still suffering from the effects of said disease.

Upon the trial of the case, Defendant in Error recovered a judgment for One Thousand (\$1000.00) Dollars against the Plaintiff in Error upon which judgment was rendered and a motion for a new trial was denied.

The case is before this Honorable Court on Writ of Error to review the proceedings and findings of the United States District Court for the District of Arizona.

ERRORS RELIED ON FOR REVERSAL

There are only two questions involved in this case. The first and principal one is,

The refusal of the trial court to give the instruction requested by the Plaintiff in Error based upon its theory of defense, which was amply supported

by evidence produced by Plaintiff in Error, that the Defendant in Error was suffering from a disease and not from an injury, said disease being the cause of the pain, roaring and buzzing in his ear. The requested instruction being set forth in full on pages 113 and 114 of the Transcript of Record and in the Assignments of Error set forth below.

Second, that the verdict of the jury is not supported by and is contrary to the evidence, being wholly unsupported by the evidence and against the uncontradicted evidence and every legitimate inference deducible therefrom and as set forth in the Assignments of Error below.

ASSIGNMENTS OF ERROR

1. That the United States District Court for the District of Arizona erred in denying and overruling defendant's motion for a directed verdict at the close of defendant's evidence.

2. That the United States District Court erred in refusing to give the following instruction requested by the defendant.

"The Court instructs the jury that under the Employer's Liability Law the employer is liable to the employee only when the injury is caused by an accident arising out of and in the course of the labor, service and employment of the employee and due to a condition or conditions of such occupation or employment and only when such injury shall not have been caused by the negligence of the employee injured. Such

law does not cover ordinary sickness, even though such sickness was contracted during the course of the employment; unless you can say that the accident caused the sickness, and if you believe from the evidence in this case that the alleged concussion did not cause plaintiff's injury, then he cannot recover even though you do find that he is suffering and has suffered from some disease. I further charge you that even though you believe the plaintiff was suffering from deafness or other trouble and that said deafness or other trouble was occasioned by disease and not by injury received while in the employ of United Verde Copper Company, then he cannot recover. The law does not cover or contemplate payment for any disease and in this case the plaintiff claims to have been injured by an accident and that accident caused his injury and the proof is not made by showing that he was suffering from some disease. You cannot and must not permit your sympathy for a man who has been sick or diseased to give him damages or compensation, because under the law he is not entitled to it and all humanity must suffer the effects of certain diseases."

3. The verdict of the jury is contrary to law.
4. The verdict of the jury is not supported by and is contrary to the evidence.
5. The United States District Court of the District of Arizona erred in entering judgment

upon the verdict and said judgment is contrary to law.

6. The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is not supported by and is contrary to the evidence.

7. The United States District Court for the District of Arizona erred in refusing to grant the defendant a new trial.

POINTS AND AUTHORITIES

I

The Arizona Employers Liability Law provides compensation for injuries received by employees while working in certain occupations declared to be hazardous, where such injuries are caused by any accident arising out of and in the course of such labor, service and employment and due to a condition or conditions of such occupation or employment and is not caused by the negligence of the employee. The law does not provide any remedy for occupational diseases or ordinary sickness contracted while at work.

Constitution of Arizona, Article XVIII,
Section 7. .

Title 14, Chapter VI, Revised Statutes of
Arizona, 1913, Civil Code.

Arizona Copper Co. vs. Hammer, 250 U. S.,
400, 63 Law Ed., 1059.

II

It is the duty of the trial court to submit to the jury, and give instructions thereon, any issues,

theory or defense which the evidence tends to support.

Smith et al. vs. Carrington et al., 4 Cranch, 62; 2 Law Ed., 550.

Douglas vs. McAllister, 3 Cranch, 298; 2 Law Ed., 445.

Stoll vs. Loving, 120 Fed., 805, 57 C. C. A., 173.

Burgess Sulphite Fibre Co. vs. Drew 157 Fed., 212; 84 C. C. A., 660.

Morenci Southern Ry. Co. vs. Monsour, 21 Arizona, 148; 185 Pac., 938.

Southwest Cotton Co. vs. Ryan, 22 Arizona, 520; pp. 536 to 543.

III

The verdict is wholly unsupported by the evidence and against the uncontradicted evidence and every legitimate inference deducible therefrom.

Lester vs. Snyder, 55 Pac., 613.

Georgia Central R. R. Co. vs. Woosley, 37 S. E., 392.

Waterbury vs. Chicago Mil. & St. P. Ry., 73 N. W., 341.

Ettlinger vs. Kahn, 36 S. W., 37.

Simon vs. Matson, 61 Pac., 478.

Jerome vs. Queen City Cycle Co., 57 N. E., 485.

Seymour vs. Seymour, 24 S. E., 193.

Vintroux vs. Simms, 31 S. E., 941.

Beall vs. Railway Co., 18 S. E., 729.

Stoffelo vs. Molina, 8 Arizona, 211.

Fish vs. Cotton Mills, 95 N. Y. Sup., 673.

Fieldhouse vs. Leisburg, 88 Pac., 211.

Rahles vs. Mfg. Co., 23 L. R. A., (NS)
296.

ARGUMENT

The first question we desire to present to this court, is whether or not the trial court erred in refusing to instruct the jury upon the theory of the Plainiff in Error, to-wit: That the Defendant in Error was suffering from a disease and not from an injury and therefore was not entitled to recover under the Employers Liability Law. The argument on this point divides itself naturally into two propositions:

First, the nature and remedies provided by the Arizona Employers Liability Law, and

Second, as to the duty of the court to give instructions upon an issue which is raised by the pleadings and supported by the evidence.

PROPOSITION I

The Arizona Employers Liability Law provides compensation for injuries received by employees working in certain occupations declared to be hazardous where, such injuries are caused by any accident arising out of and in the course of such labor, service and employment and due to a condition or conditions of such occupation or employment and is not caused by the negligence of the employee. The law does not provide any remedy for occupational diseases or ordinary sickness contracted while at work.

The Constitution of the State of Arizona, Ar-

title XVIII, Section 7, directs the Legislature to enact an Employers Liability Law in the following terms:

“To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry, the Legislature shall enact an Employer’s Liability Law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.”

It will be noticed that this covers only “death or injury caused by any accident due to a condition or conditions of such occupation.”

In compliance with the constitutional mandate, the Legislature of the State of Arizona enacted an Employers Liability Law which is Chapter VI of Title 14, Revised Statutes of Arizona, 1913, Civil Code, beginning at page 1051 thereof.

Section 3154 of the Civil Code is practically a repetition of the Constitutional provision and reads as follows:

“That to protect the safety of employees

in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the State Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

Section 3155 and 3156 provide what occupations and employments are hazardous within the terms of the law and Section 3158 provides to whom the employer is liable in case of accident or death.

The scope, the purpose and effect of the Arizona Employers Liability Law were passed upon by the Supreme Court of the United States in five cases which were decided on June 9, 1919, and are reported as *Arizona Copper Company vs. Hammer*, 250 U. S., 409; 63 Law Ed., 1059. In this decision, the law is thoroughly examined and construed by the Supreme Court of the United States.

From an examination of the Constitutional provision, the Employers Liability Law and the Hammer decision, *supra*, it can be readily seen that under this law there is no remedy provided for a

workman who becomes disabled on account of sickness or even for an occupational disease.

The theory of the plaintiff below, upon which his complaint was based, was that a blast was set off in the raise or chute and that the concussion thereof in the tunnel, in which he was standing 35 or 40 feet from such chute or raise, caused an injury to his left ear. If this were true, it would be an accident within the Arizona Employers Liability Law.

The theory of the defendant below, however, upon which its answer was predicated and in support of which, in our opinion, conclusive evidence was adduced, was that Jaber was not injured by a blast but that he was suffering from nephritis which cannot be caused by a concussion such as Jaber claimed, but is a disease which anyone may have and which takes a considerable time to develop.

If the Copper Company's theory was correct, then Jaber was not suffering from an injury caused by accident arising out of and in the course of his employment and due to a condition or conditions thereof, and he was not entitled to any compensation under the Employers Liability Law because his condition was not included within the scope of that law.

PROPOSITION II

It is the duty of the trial court to submit to the jury, and give instructions thereon, any issue, theory or defense which the evidence tends to support.

In its answer to the complaint, the Plaintiff in

Error denied that Jaber ever was injured and in support of its position it introduced evidence to show that he was suffering from nephritis.

Jaber, in his testimony, stated he was suffering from headaches, ringing in the ears, etc., and attributed this to an injury to his left ear. The physicians who testified for the Copper Company all stated that one of the symptoms of nephritis was such ringing in the ears and that the symptoms of which Jaber complained were the result of his nephritis and not of any injury to the ear. The medical witnesses for the Copper Company went into all of the symptoms in detail and all of them agreed that Jaber was not suffering from an injury to his ear but was suffering from nephritis or "Bright's" disease.

Under this state of the evidence the presiding Judge gave, among other instructions, one which explained the Arizona Employers Liability Law. The Copper Company, in support of its answer and the evidence introduced by it, prepared and submitted to the court one instruction which is set forth in full in Assignment of Error No. 2, *supra*. This instruction was refused by the Court and is the principal question now presented to this court for adjudication.

This question is not a new one. It has been passed upon a number of times by the United States Courts and enumerable times by various

state courts. The matter was twice before Chief Justice Marshall.

In the case of *Douglas and Mandeville vs. McAllister*, 3 Cranch, 298; 2 Law Ed., 445; reading from page 446:

“The Court was certainly bound to give an opinion, if required, upon any point relevant to the issue.”

Again in the case of *Smith vs. Carrington*, reported in 4 Cranch, 62; 2 Law Ed., at page 550, we find the following at page 553:

“There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes causes for an exception; but it is equally clear that the Court cannot be required to give the jury an opinion on the truth of testimony in any case.”

In order that a party may complain that the Court has refused to present its theory of the case, there are two elements required:

1. The theory must be presented in the pleadings.
2. There must be evidence to support the theory.

There can be no question but that the Plaintiff in Error in this case complied with these requirements.

It is the general rule that a Court must instruct the jury on all the issues of the case, even though

not requested to do so, in order that it may have some guidance in its deliberations. See

Sections 514-516 Revised Statutes of Arizona, 1913, Civil Code.

and the case of

Southwest Cotton Company vs. Ryan, 22 Arizona, 520.

beginning at bottom of page 536 to 543. At the top of page 538, the Court says:

“It will be observed that Paragraph 514 says that ‘the Court shall charge the jury.’ The word ‘shall’ as here used, places this duty on the Court, and it is not conditioned upon a request from either party to the litigation. It is a step in a jury trial which the Court must perform whether aided by the attorneys or not.”

At page 539, the Court Says:

“If it had been the purpose of the law-making power to relieve the court from declaring the principles of law applicable to the points only when required by the parties, it doubtless would have spoken in stronger than merely permissive terms of the duty of the parties in this respect.”

But in this case the Court was not left without any assistance, for the attorneys for the Plaintiff in Error submitted an instruction stating the law covering their theory of defense.

The law has again been stated in the following cases:

Stoll vs. Loving, 120 Fed., 805; 57 C. C. A., 173 at page 176, the Court says:

“While it may be conceded that the legal proposition stated by the court is in the abstract sound, it was inapplicable to the controversy, and misleading. Stoll’s contention that Loving had made a contract with Shaw to the exclusion of Stoll, and that the work for the payment of which suit was brought was done under that contract, was not submitted to the jury, and it cannot be known from the verdict whether the jury passed on that question, which this Court, in its former opinion, pointed out was essential to the proper determination of the controversy. That decision should have been considered as controlling by the trial court, and the failure to submit this question makes it necessary to reverse the judgment and grant a new trial.”

Burgess Sulphite Fibre Company et al., vs. Drew, 157, Fed., 212; 84 C. C. A., 660.

In the case of Morenci Southern Ry. Co. vs. Monsour, 21 Arizona, 148; 185 Pacific, 938, at page 942, the Supreme Court of Arizona says:

“Finally the defendant complains because the Court refused an instruction offered by it defining contributory negligence. That was practically the only defense made by the defendant, and we think we have stated enough of the facts developed at the trial to show that there was substantial evidence to support this defense. In such case, it was the duty of the court to

instruct the jury as requested. The tendered instruction was a correct statement of the law, and should have been given."

It is the general rule, and we think without any exception, in any of the courts in the United States, "that it is the duty of the Court to submit to the jury, and give instructions thereon, any issue, theory or defense which the evidence tends to support." 38 "Cyc.", page 1626, Note 69.

There are ~~in~~ⁱⁿnumerable citations to nearly every state in the Union together with the Supreme Court of the United States under this Note in "Cyc" and we could cite a great many other cases but we think this rule will be admitted and is practically universal.

PROPOSITION III

The verdict is wholly unsupported by the evidence and against the uncontradicted evidence and every legitimate inference deducible therefrom.

The evidence in support of the defendant's theory of the case, we respectfully submit, was wholly uncontradicted and every legitimate inference from all of the evidence of the case showed unerringly, without dispute or contradiction, that this man was suffering from a diseased condition of his body which caused the pain, roaring and ringing in his ear. The medical testimony upon such a question is conclusive against mere lay testimony. Every indication showed that this man was diseased when he first came to the attention of the doctors; a condition

which had been growing for some time as the history of the disease indicates. He was thoroughly examined by many doctors who testified in this case, and they all agreed both for plaintiff and defendant, that he was suffering from kidney trouble. The only disagreement among the doctors was the extent of his disease. There was no evidence of any kind introduced showing that there was any injury to the ear such as could be occasioned by a blast. In face of this evidence, we respectfully urge that the verdict is not supported and that the trial court erred in refusing to set aside the same and to grant a new trial.

There can be no doubt from the testimony in this case that the man, at the time of the trial, was suffering from an advanced kidney trouble and we respectfully suggest that no doubt this condition was the controlling reason in the jurors' minds for the verdict against the Company, especially in view of the fact that proper instructions were not given to them.

CONCLUSIONS

We take the position that the judgment of the lower court should be reserved and an order entered instructing a verdict for Plaintiff in Error because of the lack of evidence to support a judgment against us.

However, the principal contention in this case is that the trial court erred in its refusal of our

instruction and if the Court does not feel it is its duty to enter a judgment for the Plaintiff in Error for the lack of evidence, then we respectfully and earnestly urge that the judgment in this case should be reversed and a new trial granted for the error in refusing to instruct as requested.

Respectfully submitted,

ANDERSON, GALE & NILSSON,
Attorneys for Plaintiff in Error.

No. 4138

**UNITED STATES CIRCUIT
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED VERDE COPPER
COMPANY, a Corporation,
Plaintiff in Error.

vs.

JOE JABER,
Defendant in Error.

Upon Writ of Error to the United States
District Court of the District of Arizona.

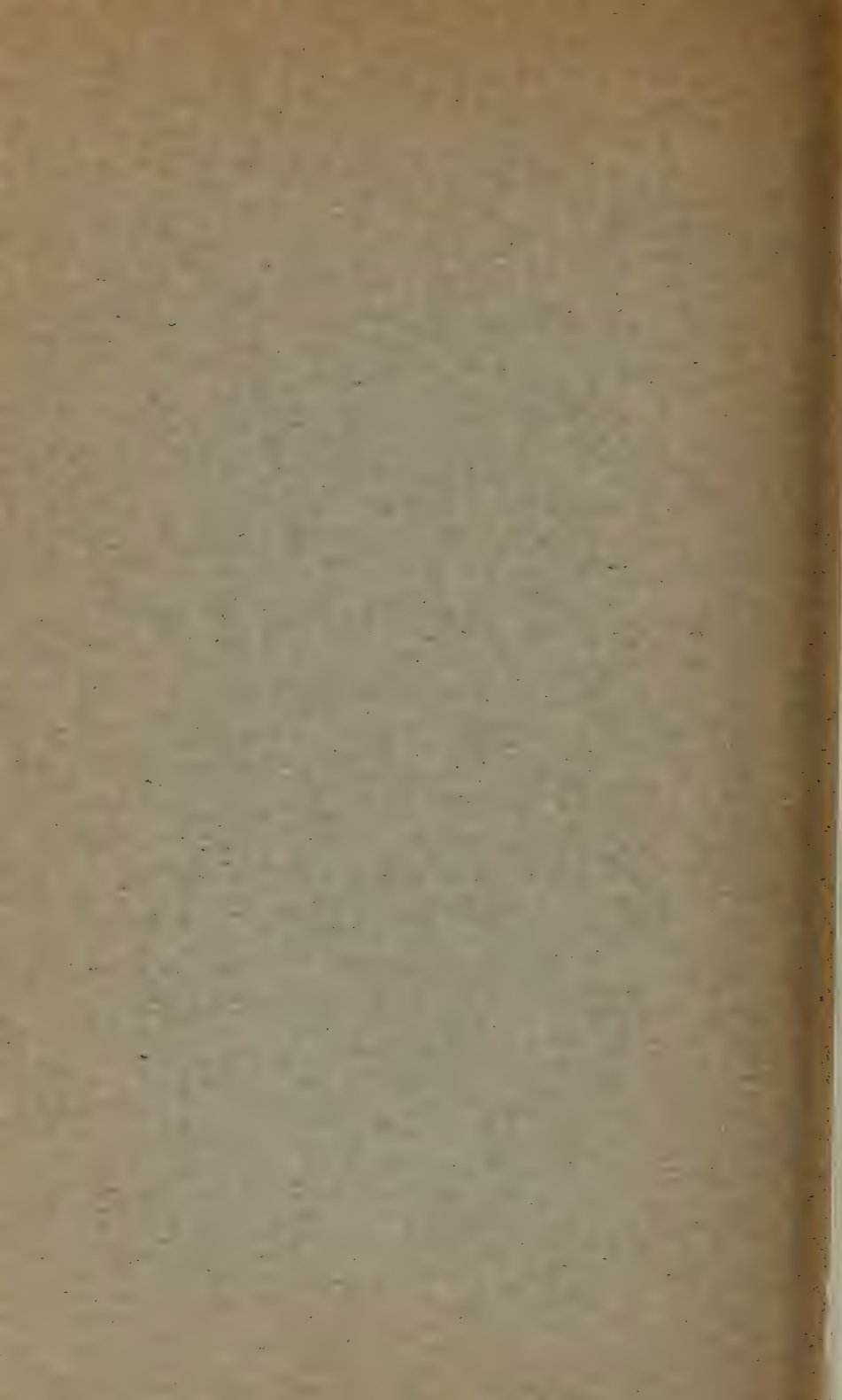
BRIEF OF DEFENDANT IN ERROR

THOMAS P. WALTON,
Attorney for Defendant in Error.

Filed this.....day of....., 1924.

FRANK D. MOUCKTON,
Clerk.

By.....
Deputy Clerk.



UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE COPPER
COMPANY, a Corporation,
Plaintiff in Error.

vs.

JOE JABER,
Defendant in Error.

No. 4138

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE

In order to clearly present the matter to the Court, a brief statement supplementary to that made by plaintiff in error will be made. Suit was filed, as stated by plaintiff in error, setting up facts, bringing the case within the provisions of Chapter 6, Title 14, Rev. Stat. of Arizona, 1913, Civil Code, being the Employers Liability Law of Arizona. (See quotation of constitutional provision, p. 11, Brief of Plaintiff in error, and Par. 3154, 3155, 3156, 3158, pp. 11-12, Brief of Plaintiff in error.) The amended Complaint (T. R. 10-13) and the Answer of Plaintiff in Error (T. R. 1) make the issues upon which the case was tried.

The case was tried to a jury and a verdict in favor of plaintiff for One Thousand (\$1,000.00) Dollars was assessed (T. R. 114). The testimony on

behalf of Jaber was furnished by himself, Mike Kronich (T. R. 100-101), Doctor J. B. McNally (T. R. 95-98), Doctor F. L. Reese (T. R. 52-56), and M. Farrage (T. R. 94). It appears:

“Jaber was employed by the Copper Company as a mucker during the latter part of June, 1922, including June 27th of that year, the day upon which he alleges he was injured.”
(Brief of Plaintiff in Error, p. 1.)

“Jaber was working in the mine belonging to the Copper Company in what is known as the 1000-foot level, which is a large tunnel into which standard gauge railway cars are brought and loaded with ore.

It was the duty of Jaber to keep the floor of the tunnel and the tracks clear of ore or muck, which spilled over the sides of the cars when they were being filled, so that the cars would be operated thereon (T. of R., page 42).

The ore is loaded into the cars from what is called a raise or chute which comes out at the top of one side of the tunnel as illustrated in Defendant's 'Exhibit 2' (T. of R., p. 19), and more fully described in the testimony of Mr. DeCamp on pages 61 and 62 of Transcript of Record.

Occasionally it becomes necessary to set off a blast in the chute because large rocks may arch at the point of discharge or the ore may be moist and so clog up the chute.”

(Brief of Plaintiff in Error, p. 3.)

Before the injury or blast, Jaber had never been sick (T. R. 42). Before the blast he was feeling

fine, had no headache, no dizziness, no roaring in ear (T. R. 48). *Blast went off, had headache, dizzy, ear drill, fell down, was awfully sick....* Blast was in chute in raise.

Jaber was in tunnel thirty-five or forty feet from raise (T. R. 43). He got to his room at 1 o'clock at night after blast, couldn't sleep, headache, was sick, ear drill, was dizzy. At 9 o'clock next morning saw Doctor Walsh at Copper Company hospital, told Doctor Walsh all about it (T. R. 44). Mr. Farrage was with Jaber first time he went to hospital (T. R. 57). Jaber told Doctor Walsh he felt trouble with ear when blast went off (T. R. 44). Told Doctor Walsh trouble with ear came from shot or blast. Saw Doctor Tom at Copper Company's hospital, told him about ear trouble (T. R. 45). *From the time of the blast, Jaber says he has not been able to hear in left ear* (T. R. 47). Jaber says when he went to work for Copper Company, Doctor Walsh undressed him and examined him in every way, said nothing about any disease (T. R. 58). Mr. Farrage testified that he accompanied Jaber to Copper Company hospital 27th or 28th of June, 1922; that Jaber told doctor at hospital that he was *dizzy from blast in mine, was hurt from a shot* (T. R. 94-95).

Doctor Reese of Phoenix, Arizona, an eye, nose and ear specialist (qualifications admitted by defendant), testified that he examined Jaber September 20, 1922. Examined left ear thoughly (T. R. 52). Came to conclusion *Jaber could not hear in left ear*. In his opinion there is no treatment that will relieve *nerve deafnes* (T. R. 54). The deafness in Jaber's ear is *nerve deafness*. It is my opinion

that the condition of Jaber's ear is due to *concussion*, or possibly a condition that comes under the name of *shell shock* (T. R. 54). There may be trouble with inner ear and ear drum appear perfectly normal, such trouble usually results from *shell shock or explosion*. A hemorrhage in inner ear leads to a form of *nerve deafness*. This would not show on ear drum. *Hemorrhage could be caused by a blast* (T. R. 52). At time of examination found nothing wrong with tonsils, noticed no pus about teeth, did not observe any effect of nephritis, found no evidence of a toxic condition. A toxic condition which would have destroyed hearing would likely *affect both ears* (T. R. 55-56).

Doctor J. B. McNally of Prescott, Arizona, a witness for Jaber (qualifications in every respect admitted by plaintiff in error), said that loose teeth from pus will never tighten. He examined Jaber two or three days before testifying at trial, *found blood pressure normal* (T. R. 95). Noise in ear and dizziness is sometimes found in nephritis of *old standing*, Bright's disease in *aged people*, where *hardening* of the arteries has set up and *high blood pressure* (T. R. 95-96). Not likely a man would have advanced case of Bright's Disease and still have *normal blood pressure*. In chronic Bright's disease, noise in ear is usually in both ears and is irregular noise. In case of accident to ear, it is an ordinary constant *buzz* and *does not change*. The latter not likely found in *Bright's disease* (T. R. 96). Doctor McNally examined Jaber's urine and found no true casts (T. R. 95-96).

It is not thought necessary to go more into details, as the statement of plaintiff in error and the

foregoing statement appears amply sufficient for all purposes of considering the assignment of errors urged for reversal. Moreover, we do not think it necessary to consider any statement of facts in order to dispose of this case, because *no assignment of error made by plaintiff in error is sufficient under the law and the rules of this Court (T. R. 116-119).*

PART I.

No assignment of error urged by plaintiff in error for reversal is sufficiently stated, nor is any assignment of error contained in the whole list of assignments of error sufficiently stated.

(A)

Only two assignments are relied upon for reversal by plaintiff in error, therefore our attention will only be directed to those assignments urged. We shall therefore, take up the assignments relied upon in their order and dispose of each. Counsel say:

“Errors relied on for reversal.

There are only two questions involved in this case. The first and principal one is,

The refusal of the trial court to give the instruction requested by the Plaintiff in Error based upon its theory of defense, which was amply supported by evidence produced by Plaintiff in Error, that the Defendant in Error was suffering from a disease and not from an injury, said disease being the cause of the pain, roaring and buzzing in his ear. The requested instruction being set forth in full on pages 113 and 114 of the Transcript of Record and in the Assignments of Error set forth below.”

(pp. 5-6, Brief of Plaintiff in Error.)

The first ground and "*principal one*" we shall first examine. It appears to be Assignment No. 2; the refusal of the Court to give a certain instruction (T. R. 117-118, Brief of Plaintiff in Error, pp. 6-7). Defendant in error contends that Assignment No. 2 is *insufficient under rule No. 11*, because this assignment neither *quotes* nor *refers to any evidence whatever that shows the relevancy of the instruction requested, neither does it state any reason whatever why the Court should have given this instruction*. It simply states that the Court erred in refusing to give a certain instruction and quotes the instruction.

Assignments of error to instructions asked for and refused will be disregarded when they neither quote nor refer to the evidence that shows the relevancy of the proposition sought to be charged.

Newman v. Virginia, T. & C. Steel & L. Co., 25 C. C. A. 382, 42 U. S. App. 466, 80 Fed. 228; Union Casualty & S. Co. v. Schwerin, 26 C. C. A. 45, 42 U. S. App. 514, 80 Fed. 638; Chicago M. & P. Co. v. Bennett, 104 C. C. A. 309, 181 Fed. 799, 800; Chapman v. Reynolds, 23 C. C. A. 166, 33 U. S. App. 686, 77 Fed. 274; Western North Carolina Land Co. v. Scaife, 25 C. C. A. 461, 42 U. S. App. 439, 80 Fed. 352.

The Court says in Newman v. Virginia, *supra*, p. 234, 80 Fed.:

"So far as the assignments relate to instructions asked for and refused they neither quote nor refer to the evidence that shows the rele-

vancy of the proposition of law propounded by such instruction."

Again the Court says in *Union Casualty & Surety Co. v. Schwerin*, 80 Fed. 639, *supra*:

"We are unable to consider the points suggested by counsel for the plaintiff in error concerning the refusal of the Court below to give the instructions asked for by the defendant, for the reason that the evidence, if any there was, showing the relevancy of the propositions of law propounded thereby, is neither quoted in full, nor its substance referred to in the assignments of error."

(B)

"The second error relied on for reversal.

That the verdict of the jury is not supported by and is contrary to the evidence."

This ground for reversal appears to be based upon Assignment No. 4 (T. R. 118). We shall deal with this assignment as briefly as possible, as it is so *patently insufficient* that it needs only to be called to the attention of the Court.

The law upon this proposition has been very plainly stated and it seems that counsel have wholly overlooked the necessary procedure to bring such matter to the attention of the Court:

An assignment that the verdict is not justified by the evidence and is contrary to law will not be considered, as it does not conform to the rule.

Chicago, M. & St. P. R. Co. v. Anderson, 94 C. C. A. 241, 168 Fed. 902; Ireton v. Pennsylvania Co. 107 C. C. A. 304, 185 Fed. 84; Western U. Teleg. Co. v. Winland, 104 C. C. A. 439, 182 Fed. 493.

Manifestly, neither assignment of error is sufficiently stated to justify the Court in considering them, since:

The alleged error of law assigned must be sufficiently specific, so that the understanding and attention of the court is at once arrested without being forced to search the record to determine what the issue is.

Grape Creek Coal Co. v. Farmers' Loan & T. Co., 12 C. C. A. 350, 24 U. S. App. 38, 63 Fed. 891; Piper v. Cashell, 58 C. C. A. 396, 122 Fed. 616; Esterly v. Rua, 58 C. C. A. 548, 122 Fed. 609.

The Court will not search the record for errors.

Green County v. Thomas, 211 U. S. 602, 53 L. ed. 345, 29 Sup. Ct. Rep. 168.

The judgment of the trial Court must therefore be affirmed.

PART II.

Should the Court deem either of the reasons for reversal sufficiently stated in the assignments of error, or should the Court determine to consider the

assignments of error urged by counsel, regardless of the deficiency in their statement, then it is submitted that neither assignment raises a question that can be under any consideration reversible error. The questions raised are wholly without merit. The points and authorities we think beside the issues, hence do not furnish the Court light or authority germane to the investigation.

There are only two assignments of error relied upon by plaintiff in error, to-wit:

(a) The Court erred in refusing to give a certain instruction (Assig. No. 2, T. R. 117-118).

(b) The verdict of the jury is not supported by and is contrary to the evidence (Assig. No. 4, T. R. 118).

We shall consider the assignment stated (a) first above. Obviously, the *only* question presented by this assignment is whether the Court erred in refusing to give *this instruction*. This assignment surely does not present to the Court for consideration the broad question of the *duty of the trial Court to submit to the jury and give instructions thereon any theory or defense which the evidence tends to support*. If counsel had wanted to present this question on appeal, needless to say, it should have been squarely presented to the trial Court, and upon refusal, saved exception and presented an assignment based upon such exception and refusal by the Court to give opinion upon this matter. Manifestly, this broad question cannot be raised for the first time on appeal or writ of error. We shall discuss this question by laying down a proposition.

PROPOSITION I.

The Court did not err in refusing to give the instruction requested, because the instruction as requested was not a correct statement of the law.

POINTS AND AUTHORITIES.

(1) The instruction requested was not a correct statement of the law if the word "*injury*" was used in more than one sense in the instruction. *Neff v. Cameron*, 213 Mo. 350, 111 S. W. 1139, 127 A. S. R. 606, 18 L. R. A. (N. S.) 320.

(2) The instruction requested was not a correct statement of the law unless it ought to have been given in the very terms in which it was proposed. *Brooks v. Marbury*, 11 Wheat 78, 6 L. ed. 423, 14 R. C. L. pp. 800-801, Par. 60, and cases cited.

(3) The instruction requested was not a correct statement of the law if it was erroneous in part. 14 R. C. L. p. 800, Par. 60.

(4) The instruction requested was not a correct statement if it was conflicting or contradictory in itself. 14 R. C. L. pp. 777, Par. 45, and cases cited.

(5.) The instruction requested was not a correct statement of the law if it was indefinite, uncertain, involved or ambiguous. 14 R. C. L. pp. 770-771, Par. 38.

(6) The instruction requested was not a correct statement of the law if it *assumed facts in issue*. 14 R. C. L. p. 38, Par. 12, and cases cited.

ARGUMENT.

The instruction requested was properly refused if the word "*injury*" is used in more than one sense. It is first used to designate the result of an accident, for instance:

"The Court instructs the jury that under the Employers' Liability Law the employer is liable to the employee only when the *injury* is caused by an accident arising out of and in the course of the labor, service and employment of the employee and due to a condition or conditions of such occupation or employment and only when such *injury* shall not have been caused by the negligence of the employee injured."

The word "*injury*" is next used to designate an assumed condition which is not the result of an accident, but the result of assumed sickness or disease:

"and if you believe from the evidence in this case that the alleged concussion did not cause plaintiff's *injury*, then he cannot recover even though you do find that he is suffering and has suffered from some disease."

Parts of the instruction requested are contradictory, uncertain, involved and ambiguous, for instance:

"Such law does not cover ordinary sickness, even though such sickness was contracted during the course of the employment; unless you can say that the accident caused the sickness."

Certainly, this is not a clear statement, but is ambiguous and indefinite. If instead of the word "cover", counsel had used the expression "*contemplate the recovery of damages for*" or some such plain expression, that part of the instruction might have been rendered intelligible and reasonably definite. However, the part of the instruction above quoted, even though obviously crude, ambiguous and uncertain, is set *at naught* by the following broad statement:

"The law does not cover or contemplate payment for any disease."

If counsel intended for the Court to say here that the law does not contemplate recovery of damages for an accident which causes a disease or even aggravates an existing disease, such statement is far from a correct statement of the law. 8 R. C. L. pp. 436-438, Pars. 10-11, Verde Combination Cop. Co. v. Reito, 22 Ariz. 445, 198, Pac. 462.

The instruction requested was properly refused because facts in issue are assumed, for instance:

"You cannot and must not permit your sympathy for a man who has been sick or diseased to give him damages or compensation, because under the law he is not entitled to it and all humanity must suffer the effects of certain diseases."

Counsel would here have the Court tell the jury that defendant in error, Jaber, "has been sick or diseased," and the jury must not permit their sympathy for a "sick or diseased" plaintiff to induce them to give him damages or compensation. They

want the Court to lay down the proposition as a fact that Jaber was "sick and diseased" and follow it by telling the jury that under the law he is not entitled to damages "because all humanity must suffer the effect of certain diseases." Regardless of what counsel for plaintiff in error may contend that the evidence adduced by witnesses on behalf of the Copper Company shows or tends to show, Jaber testified that before the injury he had never been sick (T. R. 42). Before the blast he was feeling fine (T. R. 48). Blast went off, he had headache, dizzy, ear drill, fell down, was awfully sick (T. R. 43). *From the time of the blast, Jaber says he has not been able to hear in left ear* (T. R. 47). Certainly, this testimony raises the sharpest kind of an issue as to whether or not Jaber was *ever sick, prior to the injury*. Obviously, on this state of the evidence, the Court was not justified in giving the instruction, because it assumed facts which were in issue; moreover, it would have been *plain error* to give such an instruction, even though the instruction as presented were not subject to the other fatal criticisms noted above.

We have already discussed the matter laid down by Proposition II. (Brief of Plaintiff in Error, p. 13):

"It is the duty of the trial Court to submit to the jury, and give instructions thereon any theory or defense which the evidence tends to support."

This proposition, as we have already pointed out, is not raised by either assignment of error urged by plaintiff in error, as the record does not show from

a perusal thereof where counsel presented such a proposition to the trial Court or took any exception upon the refusal of the Court to so charge. *Neither does the assignment of error—the refusal of the Court to give the instruction requested—raise this question.* Counsel cite the case of Douglas and Mandeville v. McAllister, 3 Cranch 298, 2 L. ed. 445, in support of their proposition. Upon examination of this authority it is found that the case is not in point, it simply lays down the time-worn elementary principle that the Court must instruct on any point relevant when a *proper* instruction is requested. It will be noted that the instruction requested in that case was held by the Court not to be a correct statement of the law and was refused, and the Court held such refusal was not error. Then counsel cite the case of Smith v. Carrington, 4 Cranch, 62, 2 L. ed. 550. This case in no way can comfort plaintiff in error, because the Court simply lays down the elementary proposition that a party by a request for a *proper* instruction may require the opinion of the Court and, upon refusal, have good cause for exception. This proposition, of course, is not disputed. It is just as good law now as it was when it was laid down in that case. Of course, there is an exception that should be remembered in this connection, which exception is just as firmly founded on principle as precedent, and is this:

When the general charge substantially covers the case, and was all that was necessary to give the jury an intelligent understanding of the law applicable to the facts, the Court may refuse special charges offered, even though

such special charges may state the law clearly as applied to the facts.

Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 29 L. ed. 712, 6 Sup. Ct. Rep. 481; Norfolk & P. Traction Co. v. Rephan, 110 C. C. A. 254, 188 Fed. 284, 285; International Banking Corp. v. Payne, 110 C. C. A. 418, 188 Fed. 40; Southern R. Co. v. Terrell, 108 C. C. A. 377, 186 Fed. 299; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 295, 23 L. ed. 899; Ruch v. Rock Island, 97 U. S. 695, 24 L. ed. 1102; Northwestern Mut. L. Ins. Co. v. Muskegon Nat. Bank, 122 U. S. 510, 30 L. ed. 1103, 7 Sup. Ct. Rep. 1221; Meyer v. Richards, 49 C. C. A. 344, 11 Fed. 297; Simmons Co. v. Eskridge, 186 Fed. 676; Coulter v. B. Thompson Lumber Co., 74 C. C. A. 38, 142 Fed. 706; Mountain Copper Co. v. Van Buren, 66 C. C. A. 151, 133 Fed. 7.

Counsel then cite sections 514-516, Rev. Stat. of Arizona, 1913, Civil Code, and Southwest Cotton Co. v. Ryan, 22 Ariz. 520. In this connection we call attention to the fact that the Federal Courts are not bound by state laws or practice in charging the jury. Charging the jury is a function of the personal administration of the judge, and does not fall within the provisions of the conformity act sec. 914, U. S. Rev. Stat. U. S. Compt. Stat. 1901, p. 684, for it is neither practice, proceeding, nor pleading.

Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286; Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co., 66 C. C. A. 543, 133 Fed. 713, 714; Knight v. Illinois C. R. Co., 103 C. C. A. 514, 180 Fed. 372.

Again, the Federal Courts are not required to instruct the jury upon the "whole law." *Steers et al. v. United States*, 192 Fed. 1, the Court says (p. 10, *supra*) :

"Counsel urge in this court that under the Kentucky practice it is the duty of the trial judge to give to the jury 'the whole law,' and that respondents, in a criminal case, carries no such burden, as we, by these conclusions, put upon them.' This is a matter pertaining to the conduct of the trial itself by the trial judge and it is not covered by the conformity act."

Counsel then cite and quote from the case of *Stoll v. Loving*, 120 Fed. 805, 57 C. C. A. 173. There is nothing new in this case, as the instruction requested in the *Stoll* case was held to be a proper instruction.

Counsel then cite the case of *Burgess Sulphite Fibre Company et al. v. Drew*, 157 Fed. 212, 84 C. C. A. 660. From an examination of this case, we find the Court expresses itself in these words at p. 215, Fed. *supra*.

"The defendants were entitled to have the various propositions as to the laws of Vermont, to which we have referred, clearly and fully sifted out and explained to the jury; that the defendants ultimately requested such explanations; that they failed to obtain them; that they duly excepted."

Certainly, this expression is not different than we have already stated, that is, *a proper instruction must be requested, refused and excepted to, and*

upon writ of error, a proper assignment made up in order to review the ruling of the trial court.

Counsel then cite the case of *Morenci Southern Ry. Co. v. Monsour*, 21 Arizona, 148, 185 Pac. 938, and quote from page 942, a statement made by the Supreme Court of Arizona. Note the last expression in this statement quoted:

“The tendered instruction was a correct statement of the law, and should have been given.”

Certainly, this decision is not different from the authorities already cited by defendant in error to the effect:

(1) That an assignment of error consisting of the refusal of the Court to give a particular instruction is not good unless the instruction itself is a *“correct statement of the law.”*

(2) That an assignment of error consisting of the refusal of the Court to give a particular instruction does not call upon this Court to decide whether “it is the duty of the trial Court to submit to the jury, and give instructions thereon, any issue, theory or defense, which the evidence tends to support,” unless, of course, the requested instruction ought to have been given in the very terms in which it is proposed.

Brooks v. Marbury, 11 Wheat. 78, 6 L. ed. 423; *Fowler v. Brantley*, 14 Pet. 318, 10 United States, L. ed. 473, 14 R. C. L., pp. 800-801, Par. 60, and cases cited.

We think we have thoroughly disposed of the idea that the trial Court erred in refusing to give the in-

struction requested by plaintiff in error, and have shown conclusively that no reversible error has been committed by the trial Court in this respect; moreover, the *general charge of the trial Court* (T. R. 103-112) *substantially covered the case and was all that was necessary to give the jury an intelligent understanding of the law applicable to the facts.*

Iron Silver Mining Co. v. Cheesman, 116 U. S. 529, 29 L. ed. 712, and other cases cited to this effect, *supra*.

PART III.

The second assignment of error relied upon by plaintiff in error for reversal (Brief of Plaintiff in Error, p. 7) is "the verdict of the jury is not supported by and is contrary to the evidence." We think it is hardly worth while to notice at all this assignment, for reasons already pointed out to the Court because of its *patent insufficiency*, as shown in this brief, Part IB, *supra*. However, we shall briefly examine this assignment and the argument in the brief of plaintiff in error on this question. The point made by plaintiff in error (their brief, p. 9):

"III. The verdict is wholly unsupported by the evidence and against the uncontradicted evidence and every legitimate inference deducible therefrom."

we submit is wholly untenable. This point is attempted to be supported by the citation of thirteen different authorities. These authorities have been

partially examined and we find that the sum and substance of the holdings in these cases is to this effect: All that is necessary in order for an appellate court to affirm a judgment of a trial Court where a verdict in favor of plaintiff has been returned is that the record must contain some positive, affirmative evidence in support of each material allegation in the complaint.

In order to determine whether or not there was sufficient evidence to support the verdict, of course, it would be necessary to examine all of the testimony furnished at the trial by the defendant in error. If there is some affirmative evidence on each and every material allegation in the complaint, then certainly we need go no further. We shall not burden the Court with again reciting the evidence adduced by defendant in error at the trial, as we think our statement of the case in this brief amply covers the case and demonstrates that there was an abundance of positive affirmative evidence adduced by defendant in error at the trial upon each and every material allegation in the complaint, based upon the Arizona Employers' Liability Law, being Chapter 6, Title 14, Rev. Stat. of Arizona, 1913, Civil Code. (For text part of act, see Brief of Plaintiff in Error, pp. 11-12.)

Counsel seem to lose sight of the fact that in this Court only *questions of law* are considered and not *law and fact*.

Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co., 52 C. C. A. 95, 114 Fed. 134; Wichita R. & Light Co. v. Dulaney, 86 C. C. A. 397, 159

Fed. 417; Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502.

Again:

The rule is that when the facts are tried by a jury under sections 649, 700 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, pp. 525-570, and a general verdict returned, it is conclusive in the appellate court; it can only be remedied by a motion for new trial.

Lehnen v. Dickson, 146 U. S. 73, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; Union County Nat. Bank v. Ozan Lumber Co., 103 C. C. A. 584, 179 Fed. 710; Hayden v. Ogden Sav. Bank, 85 C. C. A. 558, 158 Fed. 91; New York v. Washburn, 64 C. C. A. 132, 129 Fed. 564; Mason v. Smith, 112 C. C. A. 146, 191 Fed. 502; West Virginia N. R. Co. v. United States, 67 C. C. A. 220, 134 Fed. 198; J. W. Bishop Co. v. Shelhorse, 72 C. C. A. 337, 141 Fed. 643, and cases cited."

The appellate court, as a rule, cannot weigh evidence on writ of error.

Jackson v. Mutual L. Ins. Co., 108 C. C. A. 389, 186 Fed. 447; Toledo, St. L. & W. R. Co. v. Howe, 112 C. C. A. 262, 191 Fed. 776.

The appellate court must take facts as found.

Hamilton v. Loeb, 108 C. C. A. 108, 186 Fed. 7; Ware v. Wunder Brewing Co., 87 C. C. A. 235, 160 Fed. 79, and cases cited."

Of course, it is immaterial in disposing of this assignment of error and the question attempted to

be raised thereby *what the witnesses for plaintiff in error testified to at the trial*, as this Court cannot weigh the evidence nor pass upon the credibility of the witnesses.

We submit that no reversible error has been pointed out by plaintiff in error, nor has any reason been urged why the judgment of the trial Court should be reversed. All of the allegations of the complaint were abundantly supported by evidence at the trial on behalf of defendant in error. The jury returned its verdict. Plaintiff in error in the trial court filed motion for new trial. New trial was denied. The judgment should be affirmed.

CONCLUSION.

Defendant in error is compelled, though reluctantly, to suggest to this Court that 10 per cent damages should be assessed against plaintiff in error, in addition to the 6 per cent interest provided for in the judgment of the trial Court. That this is a case which comes within Rule 30 of this Court, because it manifestly appears:

(1) The writ of error in this case has delayed the proceedings on the judgment of the trial Court and appears to have been sued out *merely for delay*.

(2) The judgment of the trial Court has been stayed and defendant in error has been denied the fruits of his judgment.

(3) A total of seven assignments of error were

presented in the petition for writ of error, and only two assignments are relied upon in this Court.

(4) The five assignments abandoned by plaintiff in error are concededly without merit in form or substance.

(5) Of the two assignments of error relied upon by plaintiff in error, neither one is sufficiently stated.

(6) If either of the two assignments of error relied upon is sufficiently stated to raise a question at all, it is wholly without merit upon this record.

It would seem difficult to imagine a case taken by writ of error to an appellate court in which there was greater lack of merit. This Court should not be burdened with determining cases upon the character of showing made by plaintiff in error on this record.

Respectfully submitted,

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